Madras High Court Reports.

REPORTS OF CASES

DECIDED IN THE

HIGH COURT OF MADRAS

IN

1870 AND 1871.

BY

P. O'SULLIVAN

AND

J. M. C. MILLS,

BARRISTERS-AT-LAW.

MADRAS:

HIGGINBOTHAM AND CO., MOUNT ROAD,

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BIBL. CODR. COLL. OMN. ANIM. OXON.

SIR COLLEY HARMAN SCOTLAND, *Kt. Chief Justice.*

HON. WILLIAM HOLLOWAY, *Acting Chief Justice.*

SIR WALTER MORGAN, *Kt. Chief Justice.*

HON. WILLIAM HOLLOWAY,

[illegible]IS CHARLES INNES,

[illegible] *Puisne Judges.*

[illegible]

[illegible]

[illegible] *Advocate* [illegible]

[illegible] *Acting Ad*[illegible]

MEMORANDA.

[illegible] day of January 1871, [illegible] C. H. SCOTLAND, [illegible] left Madras for a short period, and the Hon. [illegible] was appointed to act as Chief Justice.

[illegible] day of February 1871 the Hon. [illegible] C. H. SCOTLAND [illegible] Madras and resumed the office of Chief Justice.

[illegible] 30th day of July 1871, the Hon. C. COLLETT resigned.

[illegible] the 27th day of November 1871 the Hon. Sir C. H. SCOT[illegible] resigned, and the [illegible] WALTER MORGAN entered upon his [illegible] Chief Justice [illegible] Madras.

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SIR COLLEY HARMAN SCOTLAND, *Kt. Chief Justice.*

Hon. WILLIAM HOLLOWAY, *Acting Chief Justice.*

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Hon. WILLIAM HOLLOWAY,
Hon. LEWIS CHARLES INNES,
Hon. CHARLES COLLETT,
Hon. JAMES KERNAN,
Hon. JOHN ROBERT KINDERSLEY, } *Puisne Judges.*

Hon. JOHN BRUCE NORTON, *Advocate General.*

Hon. JOHN DAWSON MAYNE, *Acting Advocate General.*

MEMORANDA.

ON the 20th day of January 1871, the Hon. *Sir* C. H. SCOTLAND, Chief Justice, left Madras for a short period; and the Hon. W. HOLLOWAY was appointed to act as Chief Justice.

On the 18th day of February 1871, the Hon. Sir C. H. SCOTLAND returned to Madras and resumed the office of Chief Justice.

On the 30th day of July 1871, the Hon. C. COLLETT resigned.

On the 27th day of November 1871, the Hon. Sir C. H. SCOTLAND resigned, and the Hon. Sir WALTER MORGAN entered upon his duties as Chief Justice of Madras.

RULES OF THE HIGH COURT OF JUDICATURE AT MADRAS, PASSED ON THE 3RD OF AUGUST 1871.

1. A Respondent in an Appeal shall not be entitled to raise an objection to the decree or order in question unless he shall have filed in the Registrar's Office a Memorandum stating such objection (properly stamped) eight clear days before the day of hearing and shall not, without the leave of the Court for special cause, be heard in support of such objection, unless he shall have served a copy thereof on the Appellant or his Advocate or Vakil the same number of days before.

2. Every application by an Appellant for leave to file a Memorandum of an additional ground of appeal shall be made by Petition *ten* clear days before the day of hearing, and, when granted, the Appellant shall not, without the leave of the Court for special cause, be heard in support of such ground unless he shall have served a copy thereof on the Respondent or his Advocate or Vakil eight clear days before.

3. It shall not be sufficient in a Petition or Memorandum of Appeal or Memorandum of Objection filed in an Appeal to state as a ground of objection that the decision appealed from is contrary to law or usage, or that there has been substantial error or defect in the procedure or investigation of the case, or to the like effect: but the Petition or Memorandum shall set forth specifically the error of law, breach of usage, or defect in procedure or investigation meant to be relied upon: and an Appellant or Respondent will not be permitted to raise at the hearing of the Appeal any legal objection not so set forth.

4. No Petition or Memorandum of Appeal or of Objection which contains such a general statement without setting forth any other ground of appeal or objection shall be received in the Registrar's Office on the Original or Appellate Sides of the Court.

5. No Petition or Memorandum of Special Appeal or of Objection by a Respondent in a Special Appeal which may appear to the Registrar or, in his absence, the Deputy Registrar, to be defective in not stating

specifically any objection which is an admissible ground of Special Appeal under Section 372 of Act VIII of 1859 shall be received and registered until a Judge shall so order.

6. Every such Petition or Memorandum of Appeal or Objection shall be referred by the Registrar or, in his absence, the Deputy Registrar, for the consideration and order of a Judge unless the party by or on whose behalf it is presented acquiesce in the opinion of the Registrar or Deputy Registrar and desire to amend it—in which case the Petition or Memorandum shall be returned for correction by substituting an admissible ground of objection, and the time allowed for that purpose shall be three clear days.

7. Every such reference shall be set down for hearing and determination by the single Judge whom the Chief Justice may, from time to time, appoint to sit for the purpose, and his determination must be drawn up in the form of an Order of Court under Section 25 of Act XXIII of 1861. Notice of the day of hearing shall be given by affixing a list of the references to the public notice boards at the Court-house two clear days before the day of hearing.

8. Rules 5, 6 and 7 shall come into operation on the 20th day of October next.

C. H. SCOTLAND, *Chief Justice.*

W. HOLLOWAY,
L. C. INNES,
J. KERNAN,
J. R. KINDERSLEY, } *Judges.*

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CORRIGENDA.

Page 2, line 5, *for* 'dimissal' *read* 'dismissal.'
„ 7, line 5 of the head-note, *dele* 'legitimate.'
„ 9, line 7 from bottom, *insert a commu after* 'Mangalore.'
„ 34, line 20 from bottom, for 'defendants' *read* 'plaintiffs.'
„ 38, line 3 from bottom, *insert* 'the petitioner' *before* 'in person.'
„ 83, line 1 of the head-note, *for* 'A' *read* 'An.'
„ 87, line 20, *for* 'were' *read* 'was.'
„ 93, line 11 from bottom, *for* 'a' *read* 'an.'
„ 203, line 14, *for* '*Hodson*' *read* '*Hodgson.*'
„ 276, line 3, *insert* 'I' *before* 'take.'
„ 307, line 17 of the head-note, *for* 'or cannot' *read* 'but cannot.'
„ 329, line 18, *for* 'sons' *read* 'son.'
„ iv of the Rulings, line 14, for '*Krtshna*' read '*Krishna.*'
„ xi „ line 3 from bottom, *for* 'does' *read* 'did.'
„ xii „ last line, *for* 'likey' *read* 'likely.'

MADRAS HIGH COURT REPORTS.

Appellate Jurisdiction. (a)

Special Appeal No. 537 of 1869.

CHINNAPPA CHETTI...*Special Appellant*.... ...(*Plaintiff.*)

NADARAJA PILLAI and another... *Special Respondents*... (*1st and 5th Defendants.*)

A special appeal lies to the High Court from an order passed under Section 346 of the Civil Procedure Code dismissing the appellant's regular appeal for non-appearance of the appellant in person or his pleader.

Devappa Setti v. *Ramanadha Bhatt* (3, H. C. Reports, 109) commented on.

THIS was a special appeal against the decree of the Acting Judge of the Court of Small Causes of Cuddalore, on the Principal Sadr Amin's side, dismissing for default the Regular Appeal No. 94 of 1867 against the decree of the Court of the District Munsif of Chidambram, in Original Suit No. 590 of 1865. 1870. *July* 22. *S. A. No.* 537 *of* 1869.

Sanjiva Row, for the appellant.

Craig, for the respondent.

The facts appear from the following

JUDGMENT:—This is a special appeal from an order passed under Section 346 of Act VIII of 1859 dismissing the appellant's regular appeal for non-appearance of the appellant either in person or by a pleader. An order, it appears, was afterwards passed under Section 347 rejecting an application duly made by the appellant for the re-admission of the Regular Appeal, and the petition of Special Appeal as at first presented was from that order, but, being objected to in the Registrar's Office, it was altered to its present form and the additional Stamp duty paid.

The grounds of special appeal in effect raise the objection that the non-appearance was owing to the death of the vakil employed by the appellant; and, as no notice of the death had been sent from the Court to the appellant in

(a) Present :—Scotland, C. J. and Innes, J.

1870. July 22. S. A. No. 537 of 1869.

accordance with the established practice, the dismissal was a substantial error in law in the procedure of the case.

On the appeal being called on for hearing, Mr. Craig, for the respondent, took the preliminary objection that no special appeal lay from the order of dimissal nor from the order passed under Section 347, and he relied upon a very recent case (Special Appeal No. 541 of 1869) in which it was so decided by Holloway and Kindersley, J. J. Reference was also made to the case of *Devappa Setti* v. *Ramanadha Bhatt*, 3 *Madras H. C. Reports*, 109. We deferred giving judgment until we had conferred with those Judges upon the point, and, having done so, we are of opinion that the objection is invalid.

The petition of appeal states a ground of special appeal, and is in other respects correctly drawn up as required by Section 25 of Act XXIII of 1861. It has therefore been properly registered, and the Court has jurisdiction to hear and determine the ground of objection, unless the provision in Section 372 giving the right of special appeal is rendered inapplicable to an order dismissing a regular appeal for default of prosecution by some other provision of the Civil Procedure Code.

Now the Section under which the order of dismissal in the present case was made contains no such provision, and the ground of the objection taken on behalf of the respondent is that the enactment in Section 119, expressly prohibiting an appeal from a judgment by default at the original hearing, is extended to an order passed under Section 346 by the effect of the provision at the end of Section 25 of Act XXIII of 1861, " and the case shall proceed in all other respects as a regular appeal, and shall be subject to all the rules hereinbefore provided for such appeals so far as the same be applicable."

We are of opinion that this is not a tenable construction. The provision, in its grammatical and logical construction, appears to us to relate to proceedings in a special appeal after it has been registered as an admissible appeal; and as the registration is made dependent upon compliance with the conditions upon which a special appeal is declared to be admissible, it follows, we think, that the provision can have no

reference to the rules in Section 119 relating to the jurisdiction to entertain such an appeal. In the present case the necessary conditions have been complied with as we have already pointed out. 1870. July 22. S. A. No. 537 of 1869.

It is a further argument against the general applicability of Section 119 that we find expressly enacted in Section 347 a similar provision to that in Section 119 as to an application for the re-admission of a regular appeal without any reference to its other provisions. From this circumstance it is a legitimate inference that the Legislature did not intend the provisions prohibiting an appeal to apply to the dismissal of an appeal for default of prosecution, and the effect of the express enactment is, we think, to enable the appellant to apply for the re-admission of his appeal before bringing a special appeal from the order of dismissal. There is, we think, no right of special appeal from an order refusing re-admission.

For these reasons we are of opinion that the first petition of appeal was rightly returned, and that the present special appeal lies and must be heard.

This view of the enactments conflicts with the reasoning in the judgment in the case of *Devappa Setti* v. *Ramanadha Bhatt*,[(a)] and although the point there was different, namely, the right to appeal from an order passed *ex-parte* in favor of an appellant, still the same reasons lead us to think that the decision is not sound. We should add that the conclusion at which we have arrived is concurred in by our colleagues with whom we have conferred.

Appeal allowed.

(a) 3 Madras H. C. Reports, 109.

Appellate Jurisdiction. (a)

Referred Case No. 42 *of* 1870.

VENITHITHAN CHETTY *against* MOOTHIROOLANDI CHETTY.

The plaintiff brought a suit upon a specially registered bond under Section 53 of Act XX of 1866, to recover the whole amount secured by the bond. The bond contained a stipulation that the amount should be paid by three instalments, and that in default of payment of any one instalment the whole amount should become due immediately. Default was made by the obligor.

Held, that the summary remedy provided by Section 53 of Act XX of 1866 was not available to the plaintiff to recover the whole amount secured by the bond.

A summary remedy like that provided by Section 53 must be strictly applied.

1870. *October* 28. *R. C. No.* 42 *of* 1870.

CASE referred for the opinion of the High Court by J. R. Daniel, the Acting Judge of the Court of Small Causes of Madura.

The following was the case stated :—

This suit was brought upon a specially registered bond under Section 53, Act XX of 1866, to recover the sum of Rupees 345-1-7. The bond is dated 22nd September 1868. It is stipulated that the amount should be paid in three yearly instalments of Rupees 100, on (Auni 30th, Sukula,) July 12th, 1869, (30th Chithrei, Pramaduta,) 11th May 1870, and (30th Mausi, Pramadutha) 12th March 1871, and that in default of payment of any instalment the whole amount shall become due immediately.

The following is a translation of the bond and the agreement that it should be enforced in a summary way :—

" Pledge bond dated (8th Puratasi, Vibava) 22nd September 1868, executed to Venithithan Chetty, son of Pana Pena Palniyappa Chettyar of Poothoovayal now come to Sengapadei for trade by Moothiroolandi Chetty, son of Sivakurunathen Chetty of Gopalapuram *alias* Putha Sengapadei, a cotton trader.

" On settlement of former accounts I owe you the sum of Rupees 300, for which I pledge you my $8\frac{8\frac{1}{4}}{16}$ goolies of land and two houses (boundaries, &c., are given in the bond) and I shall repay the above said three hundred Rupees with interest at the rate of 1½ per cent. in three instalments

(a) Present :—Scotland, C. J. and Holloway, J.

"viz. Rupees 100 on the 30th Auni Sukula and interest on "the whole of the principal; 100 Rupees on the 30th Chi- "threi Pramaduтha with interest as above, and 100 Rupees "on the 30th Mausi next with interest up to that date. If "any of the previous instalments fail, I shall sell the lands "according to the then price and pay you without any re- "ference to the subsequent instalments, and shall make up "the deficiency if any. Thus, I have executed this pledge "bond at my own free will."

1870. *October* 28. *R. C. No.* 42 *of* 1870.

(Signed) MOOTHIROOLANDI CHETTY.

Agreement.

"I the debtor agree that if the terms of this bond were "not properly acted up to, you shall collect the debt men- "tioned in it in a summary way under Section 53 of the "Registration Act of 1866."

(Signed) MOOTHIROOLANDI CHETTY.

The suit was instituted on July 11th, 1870, within one year from the date when the first instalment became due, and the date fixed for payment of second instalment has also expired. The question is whether the summary remedy is applicable to a bond by the terms of which the whole debt becomes due by the non-payment of one instalment. My own opinion was that the Section 53 is applicable, but from a case reported in the *Bombay High Court Reports*, *Volume* VI, page 65, it appears that the High Courts of Calcutta and Bombay have ruled that this section does not apply to agreements like this. The reasons given are that other evidence besides the bond would be necessary, and the remedy ought to be confined to the two classes of agreements mentioned in Section 53. I have, therefore, referred the question for the opinion of the High Court:—

Whether the summary remedy provided in Section 53 is applicable to the present case or not.

No Counsel were instructed.

The Court delivered the following judgment:—

SCOTLAND, C. J.—I am of opinion that the summary remedy provided by Section 53 of Act XX of

1870. October 28. R. C. No. 42 of 1870.

1866 is not available to the plaintiff for the recovery of the whole amount secured by the bond. But I do not rest this opinion at all upon the ground that the default in payment of the instalment by which the whole amount became payable is a matter for proof by evidence *dehors* the bond. I am not able to agree in the view of the learned judges who decided the case marginally noted; that a distinction in that respect exists between a default by non-payment of any instalment on a stated day by which more of the debt than the amount of the instalment becomes payable, and a default by non-payment of the whole secured debt when payable at a single date. The latter default is as much a point for proof by extraneous evidence as the former. I therefore see no reason why the allegation of default in the petition should not be thought as sufficient in the one case as in the other.

Petition of Ganapat Manikji Patil, VI Bombay High Court Reports, 64.

The sole ground of my opinion is that the present case is not strictly within Section 53. Its terms appear to me to confine the summary remedy to obligations making the whole debt payable at one date or by instalments at several dates, and in the case of an obligation of the latter description to the recovery of only the amount of each instalment as it falls due. A summary remedy of this nature must be strictly applied.

HOLLOWAY, J.—I do not dissent from the above judgment.

Appellate Jurisdiction. (a)

Criminal Regular Appeal No. 175 *of* 1870.

THOMAS NASH TURNBULL...............*Prisoner.*

The prisoner pleaded that he was a British born subject and therefore not amenable to the jurisdiction of the Session Judge of Tellicherry, by whom the prisoner had been convicted of criminal misappropriation.

The evidence showed that the prisoner was the legitimate great grandson of John Turnbull, said to have been a Serjeant in the service of the King or of the East India Company, but was insufficient to establish a lawful marriage between him and a Native Christian woman by whom he had a son, and the evidence as to his nationality was also incomplete.

Held, that the plea to the jurisdiction was not made out.

1870. *November* 14. *C. R. A. No.* 175 *of* 1870.

THIS was a Petition against the sentence of J. W. Reid, the Session Judge of Tellicherry, in Case No. 10 of the Calendar for 1870.

The prisoner was employed in the Forest Department and was convicted by the Session Judge of Tellicherry of having dishonestly misappropriated various sums of money belonging to the Government of Madras which had been entrusted to him. The prisoner pleaded to the jurisdiction on the ground that, being a British born subject, he ought to be tried before the High Court. The prisoner appealed to the High Court.

Upon the first hearing of the Appeal, the High Court remitted the case to the Session Court with directions to the Session Judge to receive any admissible evidence tendered by the prisoner in support of his plea and return the finding upon such evidence to the High Court.

The Session Judge found that the prisoner failed to establish his plea.

The prisoner was sentenced to undergo nine years' rigorous imprisonment and to pay a fine of Rupees 10,000, or in default of payment to undergo rigorous imprisonment for the further period of one year.

Miller, for the appellant, the prisoner.

The Government Pleader, for the prosecution.

(a) Present:—Scotland, C. J. and Holloway, J.

1870. November 14. C. R. A. No. 175 of 1870.

The Court delivered the following

JUDGMENT :—When this case was last before us we remitted it to the Lower Court for the purpose of giving the prisoner, Thomas Turnbull, full opportunity of adducing any evidence in his favor as to his being the legitimate descendant of an European British subject, and therefore exempt from the jurisdiction of the Tellicherry Court. That evidence has now been returned to us and the questions for our consideration are two :—

(1.) Is Thomas Turnbull the legitimate great grandson of John Turnbull, said to have been a Serjeant in the service of the King or of the East India Company ?

(2.) If so, what was the nationality of the said John Turnbull ?

As regards the first question we entertain no doubt upon the evidence that the prisoner, Thomas Turnbull, was the legitimate son of Thomas Bowyer Turnbull, and that the said Thomas Bowyer Turnbull was the legitimate son of one Thomas Turnbull. The real question is was this Thomas Turnbull as alleged the legitimate offspring of John Turnbull and a Native Christian woman ? The mere fact of Thomas Turnbull being the offspring of these two persons is of course no evidence of a lawful marriage having taken place, and the probabilities are certainly not in favor of a European having contracted marriage with a native woman at that period. The only evidence therefore consists of statements of the loosest description said to have been made by Thomas Turnbull and Thomas Turnbull's wife to the effect, that his father John was lawfully married, and even if we believe that those statements were actually made, we do not think they are entitled to much weight of themselves. But taking the least unfavourable view of the evidence it seems to us that the persons who profess to have heard those statements have only persuaded themselves into the belief that they did hear them. The improbability of any such statement having been really made is enhanced by the fact that Thomas Turnbull was a mere child at his father's death. We think therefore the legitimate descent set up by the prisoner in this case has not been proved, and it is unnecessary for us to express any opinion as to the admissibility of the hearsay evidence to which objection was taken

in the Lower Court. We may however state that, as at present advised, we agree with the remarks of Bruce, V. C. in the case of *Shields* v *Boucher* I *DeGex* and *Smale*, 40, cited at the bar. And we may add that, even if the legitimate descent had been proved to our satisfaction, we should have been compelled to hold that the evidence as to nationality was incomplete. All that the evidence, if admissible, amounts to is that John Turnbull was a European, and there is nothing to show that he was a British born subject. The Judge before whom a plea of this kind is set up may, as the High Court has recently laid down, be satisfied by the appearance of the prisoner and the circumstances brought forward at the time that the plea is true; but if not so satisfied, the plea, if persisted in, must be substantiated by sufficient evidence. The result is that the conviction of the Session Court must be affirmed, no objection having been taken to the findings upon the facts. As regards the punishment we are disposed to reduce it, and we shall send for the record for that purpose.

1870. *November* 14. *C. R. A. No.* 175 *of* 1870.

The sentence of the High Court was that the prisoner be rigorously imprisoned for a period of five years and pay a fine of Rupees 10,000 and in default be rigorously imprisoned for a further period of one year.

Appellate Jurisdiction. (*a*)

Special Appeal No. 202 *of* 1870.

TADIYA.......................*Special Appellant.*
HASANEBIYARI.. ....*Special Respondent.*

According to Mahomedan Law dower is presumed to be prompt in the absence of express contract and may be enforced at any time.

THIS was a special appeal against the revised decision of Srinivasa Rao, the Principal Sadr Amin of Mangalore in Regular Appeal No. 350 of 1867, modifying the decree of the Court of the District Munsif of Mangalore, in Original Suit No. 199 of 1863.

1870. *November* 30. *S. A. No.* 202 *of* 1870.

The plaintiff brought the suit setting forth that her husband, the defendant, not having maintained herself and the minor daughter (born of her by the defendant) for the year

(*a*) Present :—Holloway and Innes, J. J.

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1870. November 30. S. A. No. 202 of 1870.

prior to 17th February 1863, on which the defendant divorced her, Rupees 44, being the amount of expenses incurred on account of the maintenance for that year, should be recovered to her from the defendant, together with her dowry, Rupees 20.

The defendant stated that he maintained the plaintiff and had not divorced her; that she was to obtain her dowry either at the time when she was divorced or at the time of his death.

The District Munsif gave judgment as follows:—No evidence was adduced as to the plaintiff having been maintained under Mahomedan Law. The dowry is payable after marriage. As no conditions have been entered into as to the plaintiff's dowry being paid either at the time of divorcing her, or at the defendant's death, the same is payable on demand. The Court, considering it not necessary to ascertain in this suit the question whether the defendant has divorced the plaintiff, decides that the defendant should pay to the plaintiff the amount of maintenance and dowry claimed by her, together with costs.

Upon appeal the Principal Sadr Amin upheld the decision of the Munsif; but upon review pronounced the following judgment:—

Owing to Petition No. 56 of 1869 presented by the defendant for review of the judgment passed in the suit, the Principal Sadr Amin has placed the suit again on the file for re-consideration of the same for the following reasons:—

"The plaintiff claims in this suit dowry, &c., from the defendant, and the defendant states that he has not divorced her, and that the dowry is payable either at the time of divorce or at his death. On a reference to the decree in page 119 of the Appendix to Macnaughten's Mahomedan Law and also to the decree passed in Suit No. 13 of 1855 by the Mahomedan Sadr Amin, the Principal Sadr Amin comes to see that the Mahomedan Law divides the dowry into two sorts as "Moyozilla and Muvayzilla," and declares that of these the first is payable at the time of Nikka marriage, and the other at the time of divorce by the husband or after his death.

It is declared in Section 183 of the Manual of Mahomedan Law, by Sadagopacharyar, that should there be no clear understanding (between the parties) as to the time for the payment of dowry, it is payable on demand. The defendant pleads in the present suit that he has not divorced (his wife); that the dowry is payable either at the time when he will divorce her or at his death. Consequently, the suit has been placed again on the file in order to ascertain whether the defendant had divorced (the plaintiff) and how the dowry is usually paid.

The Court perused the depositions, &c., given by the witnesses for the parties, and which were sent for from the Lower Court.

The Principal Sadr Amin concurs with the Court below in the opinion arrived at to the effect that the evidence given by the witnesses for the plaintiff to the effect that the defendant wrote a letter divorcing thereby the plaintiff, was not credible, and that the said circumstance was not proved. With reference to the divorce alleged to have taken place at Bolara, attached to the town of Mangalore, it is to be observed that while the people and Mokhtears of the parties' own caste, as well as the neighbours, such as Khazi Katiba, Mukri, &c, were available, there was no reason for the people of the Sajip village situate at a distance of more than 4 kosses, and wherein the plaintiff lived, meeting together at that time to the exclusion of any one of the abovementioned persons, and also prove Ammarivayava man being procured for writing the said letter. Moreover, the Cazi of Mangalore town has, in the decree passed by him, and which was produced by the defendant, held that the defendant has not divorced (the plaintiff), and that the letter was got up in the name of the defendant. Under these circumstances, the Court concludes that the defendant has not divorced (the plaintiff), and that the letter produced by the plaintiff was not actually written by the defendant.

The point that remains still for consideration is whether the plaintiff is entitled to obtain the dowry at once. The witnesses that gave their evidence in favour of the defendant in the above respect deposed that the dowry is given among the parties of the suit who are of Saffe Majab class either at

1870. November 30. S. A. No. 202 of 1870.

the time when husband and wife join together, or after the death (of the husband); and their evidence is consistent with the meaning of the decrees referred to above. As it has been concluded that the defendant did not divorce (the plaintiff), it does not appear proper that dowry should be awarded (to the plaintiff.)

Hence, the Principal Sadr Amin reverses such portion of the decree appealed against as awarded the amount of dowry, and amends his previous judgment by deciding that no costs will be directed to be paid by the defendant to the plaintiff, inasmuch as she carried on false proceedings to the effect that she was divorced, &c., by the defendant; and that the parties should bear their respective costs.

The plaintiff presented a special appeal to the High Court.

Parthasarathy Aiyangar, for the special appellant, the plaintiff.

The Court delivered the following

JUDGMENT:— This is an appeal against the disallowance of dower because there had been no divorce.

The authorities seem to be in accord upon the point that dower is of two sorts; I, Prompt, exigible at any time; II, Deferred, exigible at divorce. They further agree that it is a presumption of Mahomedan law that in the absence of express contract dower is presumed to be prompt. We, therefore, reverse the revised decree of the Principal Sadr Amin, except as to the matter of costs.

The Lower Court having determined that the appellant appeared before the Court with a false allegation, we do not alter the decree of the Principal Sadr Amin as to costs. There will be no costs of this special appeal.

Special Appeal allowed.

Appellate Jurisdiction. (a)

Referred Case No. 31 *of* 1870.

SUNGARA NARAYANA PILLAY and another
against
SANDIRA PILLAY and 6 others.

By the terms of a decree passed by the District Munsif the plaintiff was declared entitled to the possession of certain land together with the crops upon it. The plaintiff asked for execution of the decree in respect of the land and the crops which he alleged had been unlawfully taken away by the defendants, and possession of the land was given to the plaintiff, but he was referred to a separate suit for the damage sustained by him by reason of the removal of the crop.

Held, that no separate suit could be maintained, but the plaintiff's remedy was by a proceeding in execution under Section 11 of Act XXIII of 1861 (Civil Procedure Code.)

1870. *December 2.* *R. C. No.* 31 *of* 1870.

THIS was a case referred for the opinion of the High Court, by F. H. Woodroffe, the Acting Judge of the Court of Small Causes at Cuddalore, in Suit No. 228 of 1870.

The following was the case stated :—

Plaintiffs in this case seek to recover Rupees 188-12-8 the value of certain varagu produce which they had raised on their land and defendants unlawfully carried off in 1868.

Plaintiffs add that they obtained a decree in Suit * No. 1207 of 1868 on the file of Virdachellum District Munsif, awarding possession and the produce.

* Wherein plaintiffs were plaintiffs, and 1st, 2nd, 3rd and 4th defendants were defendants.

Defendants' pleaders contended *in limine* that with reference to Section 2, Code of Criminal Procedure, the suit was not cognizable as the plaint only discloses a *res judicata.*

From the record of the said suit, it appears that its object was simply to recover possession, but that the District Munsif, in his decree, dated 24th November 1868, directed delivery to plaintiffs of the standing crop also ; that at first there was some understanding between the parties, that the property was to be delivered up without Court process ; that subsequently plaintiffs finding the produce gone and being hindered in cultivating the land, applied to the Court to be put in possession by process and for recovery of

(a) Present :—Scotland, C. J. and Innes, J.

1870. December 2. R. C. No. 81 of 1870.

the produce value; that delivery of the land was thereupon directed, and that on 2nd December it was ordered (with reference to what, it does not appear) that if defendants had usurped any existing produce, plaintiffs might sue for damages in a competent Court.

I was of opinion that the District Munsif having decreed delivery of existing produce, plaintiffs' allegation, in the course of decree execution that defendants had removed the produce, involved questions for him and him only to determine with reference to Section 11 of Act XXIII of 1861, and that his bare order that plaintiffs might seek damages in a competent Court could not be regarded as a sufficient determination within the meaning of the Section, and that in any case it could not in the face of the words " and not by separate suit" admit of the present suit being maintained.

The question accordingly for the Honorable Court's decision is whether defendants' removal of produce, and the loss sustained thereby that plaintiffs alleged, constituted matter for the District Munsif's determination under Section 11 to the exclusion of this suit, inasmuch as they apparently arose between parties to the suit in which the decree was passed and related to the execution of the decree; or whether the matter in issue may be considered so separate from the decree as to constitute a proper cause of action in the present instance.

No Counsel were instructed.

The Court delivered the following

JUDGMENT:—The decree in the former Suit (1207 of 1868) in terms orders the delivery of possession of the land together with the crops (if any) upon it. The delivery of any crops then upon the land was therefore as much a matter enforceable by execution of the decree as the delivery of the land, and we understand from the case that it was a question between the parties when execution was applied for by the plaintiffs whether there were any crops upon the land which the defendants had removed after the decree and were compellable by process of execution to pay the value of in default of delivery. That being so, we think

the plaintiffs were improperly referred by the District Munsif to a suit for relief in respect to a matter which related to the execution of the decree, and which the Munsif should have determined, and that under Section 11 of Act XXIII of 1861 the present suit is not maintainable.

1870. December 2. R. C. No. 31 of 1870.

Appellate Jurisdiction. (a)

Civil Miscellaneous Special Appeal, No. 106 *of* 1870.

CHINNAIYA CHETTY and another. *Petitioners.*

K. NARANAPAIYA...... ... .*Counter-Petitioner.*

In the execution of a decree for land passed prior to the enactment of the Code of Civil Procedure in which the value of the produce of the land was given to the plaintiff up to the date of the decree, it is not competent to the Court executing the decree to grant further produce up to the date of execution.

THIS was an appeal against the order of the Civil Court of Mangalore, dated 2nd December 1869, confirming the order of the Court of the Additional Principal Sadr Amin of Mangalore, dated 28th September 1869, passed on Miscellaneous Petitions Nos. 182 and 217 of 1869.

1870. December 2. C. M. S. A. No. 106 of 1870.

The Petitioner applied to the Court of the Principal Sadr Amin of Mangalore for the execution of the decree in Original Suit 6 of 1855 together with the value of the produce from the date of the decree to the date of execution.

The Principal Sadr Amin, and on appeal the Civil Judge rejected the application with respect to further produce on the ground that the decree did not give further produce up to the date of execution, but only up to the date of decree.

The Petitioner appealed specially to the High Court.

Sanjiva Row, for the petitioner.

Parthasarthy Aiyangar, for the counter-petitioner.

The Court delivered the following

JUDGMENT :—The question raised in this Civil Miscellaneous Special Appeal is whether in execution of a decree for land passed prior to the enactment of the Code of Civil Procedure, in which the value of the produce of the land

(a) Present :—Scotland, C. J. and Innes, J.

1870. December 2. C. M. S. A. No. 106 of 1870.

has been granted up to the date of the decree, it is competent to the Court executing the decree to grant further produce up to the date of execution.

On the part of the special appellant, the decree holder, it was argued that it was in accordance with the practice which preceded that introduced by the Civil Procedure Code to grant further produce up to the date of execution, although there was no special provision for it in the decree, and in proof of this position two Circular Orders of the late Sadr Court were cited of the 11th May and 22nd October 1829 respectively.

In the former on a reference from the Provincial Court of the Northern Division, the Court had ordered that "when "interest is adjudged in the decree up to its date, the Courts "by an order of Court do enforce payment of the same "from that date up to the date of its execution" except in certain specified circumstances.

On the 22nd September on a reference made by the Zillah Judge of Nellore to know "whether in application "of the principle laid down in the former Circular when "land, houses, &c. yielding rent or produce of any kind are "adjudged together with rent or profit, &c. for some past "period up to the date of the plaint, the Court may adjudge "the rent, profit, &c. which may be proved to have been "received or which the party in possession is proved to be "justly responsible for up to the date of the decree and the "execution of it," the Sudder Court say:—The judges are of opinion that if the income from such property is certain rent or profit proved to have been received from it may very properly be awarded in such cases, but that though the property be of a productive kind, the Courts should be careful not to assume that profit or income has accrued from it when it may be of a precarious nature, unless the actual produce therefrom is established by evidence.

The terms of the first part of the order, it is clear, refer to cases in which the income from the property is certain, and it goes on to say that the rent or profit proved to have been received from it may very properly be awarded (*i. e.* awarded up to date of decree and the execution of it) in

1870. December 2. C. M. S. A. No. 106 of 1870.

such cases, i. e., in the cases referred to by the judge, or when rent or profit is adjudged up to date of plaint. But this part of the order, it is clear, can have no reference to the uncertain profits of land, such as the profits concerned in this special appeal, but must be restricted in its application to cases in which a fixed rent, fixed profit, or fixed income is derived from the property.

The latter part of the order has reference to property, the profit from which is of a "precarious nature," by which probably was meant "of an uncertain and fluctuating kind;" and in such case the Courts are directed not to assume the accrual of the profit or income without proof. Now, this is the sort of profit which is the subject of the present appeal. There is no provision in this Circular Order similar to that in the earlier one which required the Courts to levy execution for interest *up to date of execution* in all cases in which it was adjudged up to the date of the decree.

And the scope of the order would seem to have been limited to answering the reference as to the proper mode of passing judgment in the cases referred to, and not to have been intended to lay down rules for the course to be taken in execution, and therefore when the Courts are enjoined "not to assume that profit or income has accrued from it "where it may be of a precarious nature unless the actual "produce therefrom is established by evidence," the order must be taken to refer to evidence taken not in execution but in course of the trial prior to the decree: and as the evidence so taken could only be evidence of *past* profits, it is clear that a decree for property the profits derivable from which are of an uncertain character would not be in conformity with the Circular Order, if it awarded profits beyond the date of the decree.

Consequently, treating the decree in question as in conformity with the proper practice, it cannot be held to authorize execution as to future produce.

The order of the Principal Sadr Amin's Court and that of the Civil Judge must therefore be affirmed and this appeal must be dismissed with costs.

Appeal dismissed.

Appellate Jurisdiction. (a)

Referred Case No. 39 *of* 1870.

NARAYANA MALYA

against

GOVIND SHETTY and 2 others.

An application was made on the 14th March 1870 to the District Munsif to set aside a decree passed ex-parte against the defendants under Section 119 of the Code of Civil Procedure.

On the 3rd March 1870 the Madras Government issued a Notification under Sections 4 and 5 of Madras Act IV of 1863 investing the Additional Principal Sadr Amin of Mangalore with exclusive jurisdiction to try Small Cause Suits for sums under Rupees 500 within the jurisdiction of the District Munsif. By order of the Civil Judge the District Munsif sent to the Additional Principal Sadr Amin the records of all suits cognizable by a Court of Small Causes if one had been in existence at the date of their institution, although they had been filed before the date of the Notification, including the present application. *Held*, that the Additional Principal Sadr Amin had not jurisdiction to entertain the application.

1870. *December* 2. *R. C. No.* 39 *of* 1870.

THIS was a case referred for the opinion of the High Court by R. Vassudeva Row, the Additional Principal Sadr Amin of Mangalore in Suit No. 67 of 1870.

The following is the case stated:—

This is an application for setting aside the decree passed *ex-parte* against the defendants by the District Munsif of Mulki under Section 119 of the Code of Civil Procedure.

The application came on for hearing before me on the 8th day of July 1870 and was adjourned for further hearing and consideration, subject to the decision of the High Court upon the following case:—

The plaintiff originally brought this suit in the aforesaid District Munsif's Court on the 27th August 1869 for the recovery of Rupees 61-6-4, the same being the value of cattle sold to the defendants but not paid for.

The defendants having failed to appear, the District Munsif gave judgment for plaintiff *ex-parte* on the 24th February 1870. On the 14th March following the defendants preferred the present application to the Munsif praying that the decree may be set aside under Section 119 of the Code. On the 3rd March 1870, the Madras Government issued a Notification under Sections 4 and 5 of Madras

(a) Present:—Scotland, C. J. and Innes, J.

Act IV of 1863 investing me with exclusive special jurisdiction to try Small Cause Suits for sums below 500 Rupees over that portion of the District of South Canara which is subject to the jurisdiction of the Mulki Munsif, and under orders from the Civil Judge, the District Munsifs of Mulki and Mangalore then sent up to me and to the other Additional Principal Sadr Amin respectively the records of all such suits as would have been cognizable by a Court of Small Causes if one had been in existence on the dates of their institution, although they had been filed long before the date of the said Government Notification. The application now under reference has accompanied the said records. 1870. *December 2.* *R. O. No. 89 of 1870.*

The plaintiff alleges

1st.—That the reference is illegal inasmuch as the Civil Court is incompetent to try the suit itself or to refer it for trial to this Court under Section 6 of the Code of Civil Procedure, this Court being a Court of Small Causes, and as such being subject to the general control and orders of the High Court.

2ndly.—That the application in question ought not to be heard by me inasmuch as if I reject it there could be no appeal from my order, while the defendants had a right of appeal under Section 119 if the Munsif had been allowed to dispose of it. The suit from which this application has sprung up having been presented on a date when the parties concerned believed they had a right of appeal, he contends that it is not right that the Notification investing me with small cause powers should be so construed as to deprive them of that right.

The defendants on the other hand contend that the reference of old suits and consequently of the present application is perfectly legal and imperative under Section 12 of the Small Causes Court's Act and the Proceedings of the High Court, dated 29th January 1864.

Upon the foregoing facts I am of opinion that a Civil Judge has evidently no jurisdiction to call up or refer any suit of a small cause nature to a Small Cause Court; that the Notification of the local Government investing any Court with small cause powers cannot be held to have

1870. December 2. R. C. No. 39 of 1870.

retrospective effect in regard to suits filed previous to the date of its issue, and that the present application ought not, therefore, to have been referred to this Court. But the Civil Judge seems to have considered that under Section 12 of Act XI of 1865, the Notification constituting my Court as a Court of Small Causes precluded the Mulki Munsif from any longer hearing or determining any suits cognizable by my Court as a Court of Small Causes, although they had been filed before the issue of the said Notification, but I cannot agree with him:—

1stly.—Because I do not think that an enactment or Notification such as the one above referred to could be held to operate retrospectively unless such operation is expressly allowed therein.

2ndly.—Because by the phrase "*no suit cognizable by such Court shall be heard, &c.*," which occurs in the said Section, is meant suits cognizable by a Small Causes Court on the date of their institution, and consequently not these old suits which were not so cognizable as there was no such Court in existence at the time of their commencement, and

3rdly.—Because these suits having once been filed on the *regular* side of the Munsif's Court, where the parties had a right of appeal, it is not fair to deprive them now of that right. It may be that some of the parties may not have instituted their suits at all, if they had known that their regular suits are to be converted into Small Cause ones. As for the Proceedings of the High Court referred to by the defendants, I beg to enclose a copy thereof for the perusal of the Judges, and respectfully to state that the same has no reference to the present question. The District Munsifs were bound to deal with old suits according to the Small Cause Procedure, because Section 3, Madras Act IV of 1863 provided that "*in all suits*" (whether old or new) "of a nature cognizable in Courts of Small Causes, District Munsifs shall be governed by the same rules of procedure as if they had been appointed under Act XLII of 1860" (now Act XI of 1865.)

There is no such clear provision authorizing me to hear these old regular suits as Small Cause ones. The Notification merely constitutes my Court a Court of Small

1870. December 2. R. C. No. 39 of 1870.

Causes, and under it I think I can hear and determine only such suits of a small cause nature as may be filed in my Court since the date of the said Notification.

The questions, therefore, for the decision of the High Court are—

I. Whether suits for sums *above* Rupees 50 filed in the District Munsif's Court at Mulki previous to the date of the Notification investing me with small cause powers can now be heard and determined by me according to the Small Cause Procedure ?

II. If I am held authorized so to hear them, am I to hear the present application under Section 119 of the Civil Code as requested by the applicants or under Section 21, Act XI of 1865 ? Under which latter Section it will be incumbent upon me to refuse the new trial as the parties applying for the same are defendants, and they have not, with their notice of application, deposited in the Munsif's Court the amount for which the decree has been passed against them including the costs of the plaintiff.

No Counsel were instructed.

The Court delivered the following

JUDGMENT :—We are of opinion that the Court of the Principal Sadr Amin had not jurisdiction as a Court of Small Causes to entertain the application in the present case on two grounds :—

First, on the ground that suits pending in the Court of the District Munsif of Mulki at the date of the Notification giving the jurisdiction of Courts of Small Causes to the Court of the Principal Sadr Amin of Mangalore were not transferable to the latter Court for determination in the exercise of its Small Cause jurisdiction under Section 6 of the Code of Civil Procedure. The Court of the Principal Sadr Amin as a Court of Small Causes is not subordinate to the Civil Court; and that Section therefore is not one that can be applied to the transfer of such suits by force of the enactment in Section 47 of Act XI of 1865, which provides for the extension of the provisions of the Code of Civil Procedure to suits and proceedings under that Act so far as the same are or may be applicable. Conse-

1870. December 2. R. O. No. 39 of 1870.

quently the transfer by the Civil Court in the present case was inoperative to bring the suits within the Small Cause jurisdiction of the Principal Sadr Amin.

Secondly, on the ground that, supposing the transfer not to be invalid under Section 6 of the Code, the jurisdiction conferred by the Notification applied under Section 12 of Act XI of 1865 only to suits that had not been "heard or determined," and in the present case a decree dismissing the suit had been passed before the Notification came into force and the pending application was to set aside the decree and proceed with the suit. It is unnecessary to say more in answer to the questions submitted. But we think it right to intimate that we think Section 12 of Act XI of 1865 took away the District Munsif's jurisdiction to proceed with the hearing or determination of suits for sums above Rupees 50 cognizable by a Court of Small Causes after the Notification came into force, and to point out that the only course proper to be taken is dismissal by the District Munsif of such suits as have not been determined, and of the suit in question should the decree be set aside, upon the ground of the want of jurisdiction to proceed with the hearing, leaving the parties to bring fresh suits in the proper Court; or an application to the High Court for an order to transfer the suits to the Court of the Principal Sadr Amin.

Appellate Jurisdiction. (a)

Civil Miscellaneous Special Appeal No. 123 *of* 1870.

SUBRAYA GOUNDEN ....*Petitioner.*

VENKATAGIRI AIYAR, and 5 others...... *Counter-Petitioners.*

In execution of a decree the District Munsif made an order which he was not legally authorized to make at the instance of the purchaser of the property sold in execution. No appeal could be made against the order, but the Civil Judge entertained an appeal and reversed the order of the District Munsif.

The High Court set aside the order of the Civil Judge under Section 35, Act XXIII of 1861, but, by virtue of the powers given by the Section, the order of the District Munsif was also annulled.

1870. December 2. C. M. S. A. No. 123 of 1870.

THIS was an appeal against the order of the Civil Court of Salem, dated the 10th January 1870, passed on Civil

(a) Present :—Scotland, C. J. and Innes, J.

Petition No. 640 of 1869, modifying the order of the Court of the District Munsif of Salem, dated 1st November 1869.

1870. December 2. C. M. S. A. No. 123 of 1870.

The petitioner was a purchaser of immoveable property under a sale in execution of a decree. The decree was subsequently set aside by the Civil Court. The petitioner applied to the Court of the District Munsif of Salem, which executed the decree, for re-payment of the purchase money, for interest upon the amount, and for the value of improvements effected by the petitioner whilst he was in possession. The District Munsif granted the prayer of the petitioner with respect to the purchase money, the interest, and the value of the improvements.

Upon appeal the Civil Judge disallowed the interest and the value of the improvements. The interest was disallowed because the Civil Court in setting aside the decree said nothing about such interest; and the value of improvements upon the ground that the petitioner made them at his own risk, and the District Munsif had no power to award payment to the petitioner in respect of the interest or of the improvements.

The petitioner presented a special appeal to the High Court on the grounds that the Civil Judge had no jurisdiction to entertain the appeal, and that the petitioner was entitled to the sums awarded by the District Munsif.

Craig, for the petitioners.

Rama Row, for the counter-petitioners.

The Court delivered the following

JUDGMENT:— It is clear that an appeal did not lie to the Civil Court from the order of the District Munsif's Court upon the application of the 2nd purchaser (the present petitioner) for interest and the cost of improvements. It required an express provision to give the right of appeal, and the Code of Civil Procedure contains no such provision.

The order of the Civil Court now in question must therefore be set aside under Section 35 of Act XXIII of 1861. But as the effect of simply ordering that redress would be to entitle the petitioner to enforce the order of the District Munsif's Court, it is necessary for us, under the discretion given by that

1870. December 2. C. M. S. A. No. 123 of 1870.

Section to set aside the decision of the Civil Court or pass such other order as may appear proper, to consider whether the petitioner is entitled to the sums allowed by that order for interest and cost of improvements of the property after it was put in his possession as purchaser. With respect to the interest, the order, we think, is clearly not valid. The power given by Section 258 of the Civil Procedure Code to grant interest in the event of a sale being set aside for the time that the purchase money has been lying idle in the Court is expressly confined to the Court setting aside the sale, and in the present case the sale to the petitioner was confirmed by the District Munsif's Court and set aside under the order of the Civil Court. The order to pay interest, therefore, was made without authority. The petitioner, by proceeding to invalidate the former order of the Civil Court setting aside the sale and establish the sale to him, might have protected himself from any grievance on this account. But having acquiesced in that order the District Munsif could not exercise the power to give interest in his favor.

We are also of opinion that the order is invalid as to the amount allowed for the costs expended by the petitioner in improvements on the ground that there is no provision of the law of Procedure empowering the Courts to order the re-imbursement of such an outlay upon a sale being set aside. It was probably never contemplated that a purchaser would risk expenditure on improvements while an appeal was pending against the order of confirmation necessary to make the sale absolute, and the petitioner must, in the present case, be left to bear the consequences of his own imprudence.

The result is that the order of this Court must annul the order of the District Munsif's Court awarding interest and the costs of improvements as well as the order of the Civil Court passed on the appeal from that order, and so leave the petitioner entitled only to retain the amount of the purchase money which has been refunded to him. We think the case is one in which the parties should bear their own costs in this and both the Lower Courts.

Appellate Jurisdiction. (a)

Criminal R. A. No. 240 *of* 1870.

SELLAM..*Appellant.*

The prisoner was convicted of an offence punishable under Section 307 of the Penal Code. In addition to the sentence passed upon him under that Section, the Session Judge directed, under Section 280 of the Code of Criminal Procedure, that, at the expiration of the term of imprisonment imposed, the prisoner do execute a formal engagement in a sum of Rupees 100 for keeping the peace towards the prosecutor for a period of one year, and in default to undergo simple imprisonment for that period.

The High Court set aside so much of the sentence as directed the imprisonment of the prisoner in default of entering into the required engagement.

THIS was an appeal against the sentence of the Court of Session of Trichinopoly in Case No. 14 of the Calendar for 1870 1870. *December* 2. *C. R. A. No.* 240 *of* 1870.

The prisoner was tried and convicted under Section 307 of the Indian Penal Code. The evidence showed that he attempted to stab one Heroju Row (who, the prisoner had reason to believe, was carrying on an intrigue with his wife) with a dagger. The sentence was that the prisoner be kept to rigorous imprisonment for sixteen months, and do pay a fine of Rupees 15, and in default do undergo one month's additional rigorous imprisonment under Section 307 of the Penal Code, and that, after the expiration of the term of the imprisonment, he do execute a formal engagement in a sum of Rupees 100 for keeping the peace towards the first witness (Heroju Row) for a period of one year, and in default do suffer simple imprisonment for that period under Section 280 of the Criminal Procedure Code.

No Counsel were instructed.

The Court delivered the following

JUDGMENT :—In this case the Session Judge has convicted the prisoner of an offence under Section 307 of the Indian Penal Code, and in addition to the sentence passed upon him under that Section, with which we see no reason to interfere, has, under Section 280 of the Criminal Procedure Code, required him at the expiration of his term of imprisonment to execute a formal engagement in a sum of 100 Rupees for keeping the peace towards 1st witness for a period of one year, and has provided that, in default of his

(a) Present :—Scotland, C. J. and Innes, J.

1870. December 2. C. R. A. No. 240 of 1870.

complying with the terms of the requisition, he do suffer simple imprisonment for that period.

The Section of the Criminal Procedure Code under which this sentence was passed does not authorize or contemplate the imposition of a term of imprisonment in default of compliance with the order to enter into a recognizance to keep the peace, nor is there any provision in the Chapter to which the Section belongs for providing for imprisonment to enforce compliance with an order under Section 280 to enter into such a recognizance. The application of Section 288 is clearly limited to proceedings taken under Section 282. That portion of the Session Judge's sentence, therefore, which provides a period of imprisonment in default of the prisoner's entering into a formal engagement to keep the peace must be set aside.

Appellate Jurisdiction. (a)

Regular Appeal No. 68 of 1870.

IBRAHIM SAIB..................................*Appellant.*

MUNI MIR UDIN SAIB.......................*Respondent.*

The Mahomedan doctrine of pre-emption is not law in this Presidency.

1870. December 7. R. A. No. 68 of 1870.

THIS was a Regular Appeal against the decree of C. G. Plumer, the Acting Civil Judge of Chittoor, in Original Suit No. 24 of 1868.

This was a suit by plaintiff to enforce his right of pre-emption to 14¾ cawnies of punjah land with a hut, well, trees, and other things attached thereto, and Rupees 50 damages.

The plaint set forth that the above property belonged to one Narayana Chetty, who sold it to 1st defendant for Rupees 1,000 and executed a deed of sale on November 4th, 1867; that the plaintiff, who owns the land adjoining the said property had, under the Mahomedan law, the right of

(a) Present :—Holloway, Acting C. J., and Innes, J.

1870. December 7. R. A. No. 6 of 1870.

pre-emption; that immediately on hearing of the above sale he declared his intention of becoming the purchaser, and made the necessary affirmation by witnesses in the presence of 1st defendant; that the 2nd defendant was made a party to the suit, as he was in possession of the property.

The 1st defendant put in a written statement, in which he contended that the plaintiff's claim founded on the alleged right of pre-emption was invalid, inasmuch as the seller of the property was a Hindu, and therefore the Mahomedan law was not applicable to the suit; that the plaintiff had waived his right of pre-emption when the property was purchased by the seller in 1862; that the plaintiff did not give notice to the 1st defendant of his intention to purchase the property as set forth in the plaint; and that he made no objection to the sale of the property to 1st defendant.

The 2nd defendant's name was subsequently, by consent of both parties, struck off the record.

The following issues were settled:—

I. Whether, as affirmed by plaintiff and denied by defendant, the Mahomedan law is applicable to this case?

II. Whether, as affirmed by plaintiff and denied by defendant, the plaintiff has taken the preliminary steps to establish his right by pre-emption.

III. Whether plaintiff is entitled to the damages claimed by him, and to what amount?

The following was the judgment of the Civil Judge:—

The first and principal point to be determined is that involved in the first issue.

I will briefly allude to the facts of the case, and then give my opinion on the question of law raised in the 1st issue.

The garden, which is the subject of the present suit, was sold by one Narayana Chettyto the 1st defendant, and a deed of sale executed by the former in favor of the latter dated the 4th November 1867. The garden was then in possession of one Mahomed Alli Saib, who had rented the garden from Narayana Chetty.

This man refused to give up the possession of the garden, on the grounds that Narayana Chetty had agreed to

1870. December 7. R. A. No. 68 of 1870.

sell the garden to him at whatever price any one else might offer for it, and that he was ready to pay the price for which the garden had been sold to 1st defendant.

The 1st defendant then brought a suit in this Court against Mahomed Alli Saib and Narayana Chetty to confirm his purchase and to recover possession of the property.

This suit was finally decided in favor of 1st defendant on the 1st March 1870.

While the above suit was pending, the plaintiff filed the present suit to enforce his right of pre-emption, he being the admitted owner of the adjoining property.

The first question to be determined then is, can the Mahomedan law of pre-emption be applied in the present suit?

I am of opinion, though I admit this opinion has not been arrived at without considerable hesitation, that the Mahomedan law cannot be applied to the present suit.

I can find no judicial precedent to govern the present case,—there are many cases decided in Bengal and quoted in the Appendix to *Macnaughten's Principles of Mahomedan Law* title *Pre-emption* in which this principle of law has been applied to Hindus, but in all those cases it was distinctly stated that it was so applied in consequence of the existence of long prevailing local usage and custom sanctioning its application. Now, in this case the existence of any such local usage and custom is not alleged, but it is contended that the original vendor, the Hindu, will in no way be affected by the decision of this suit, and that, the vendee being a Mussulman, the Mahomedan law is clearly applicable.

I think, however, that the vendor will be affected by the decision of this suit, for the effect of a decree in favor of the plaintiff would be to force on him a purchaser with whom he had never contracted—it would establish the plaintiff as the original purchaser from the vendor, and not merely as a purchaser from the vendee, for it is through the former that his title would be acquired (*Baillie's Digest of Mahomedan Law, page* 490.)

It is argued that the plaintiff has the right to sue either the vendee or the vendor, but that proposition should

be qualified by the addition of the words "whomsoever of them is in possession," for "when the vendee has not taken possession, the suit is not valid against him until the vendor appear," (*Baillie's Digest, page* 486). Although the pre-emptor has the right to sue either the vendor or vendee, still, I think, this can only refer to cases where the right can be *enforced against* either. Now, in this case, it is admitted that it could not be enforced against the vendor, he being a Hindu.

BIBL. CODR. CO. ANIM. OXON.

Again, the vendee, 1st defendant, was not in possession of the property at the time of the institution of this suit—he was at that very time seeking by the aid of the Court to obtain possession of the said property.

I think, therefore, that it must be held that the constructive possession (the actual possession which has been subsequently held to have been wrongful was with a third party) as between the vendor and vendee was with the vendor; it certainly was not with the vendee. The vendor, therefore, should have been made a party to this suit instead of the vendee, but the vendor, being a Hindu, cannot be affected by this principle of Mahomedan law, and it is admitted that, as against him, the plaintiff's right of pre-emption cannot be enforced.

For these reasons then I find on the first issue that the Mahomedan law is not applicable to the present suit,—there is no necessity to go into the question of fact raised in the 2nd and 3rd issues.

The plaintiff's claim is dismissed with costs.

The plaintiff appealed to the High Court against the decree of the Civil Judge of Chittoor for the following reasons:—

1st. The decree of the Civil Judge is contrary to law.

2nd. The Mahomedan law of pre-emption is clearly applicable to the present suit.

3rd. The defendant was the proper person to be sued, and the plaintiff is entitled in law and according to usage to have his right established as against the defendant.

1870. December 7. R. A. No. 68 of 1870.

Rama Row, for the appellant, the plaintiff.

Johnstone and *Rangaiya Naidu*, for the respondent, the 1st defendant.

The Court delivered the following judgment :—

HOLLOWAY, *Ag. C. J.*—The question is whether a Mahomedan can exercise the right derived from neighbourhood (*ex jure vicinitatis*) to insist upon the sale by a Hindu being made to him instead of to another Mahomedan.

The Civil Judge decided that the proposition of law did not apply, because the vendor was a Hindu and the vendee was not in possession. Undoubtedly, the Civil Judge is right in saying that the passage at page 486 of *Baillie's Digest* is fatal to the suit in its present frame. The proposition seems to embody a rule of pleading. Where possession has not been delivered, the vendor is a necessary party. It would be wrong, however, on this the first attempt, so far as we know, to enforce such a right to allow the case to pass off upon this mere point of pleading, and I therefore proceed to consider whether this Mahomedan rule is law in this Presidency. It is clearly not so by positive enactment or by customary law assimilating this rule of positive law and making it an existent rule of our law. It is needless to add that it is not so as the so-called *lex loci rei sitae* and therefore governing matters connected with the alienability and other incidents of real property.

The question therefore resolves itself into whether it is consistent with equity and good conscience to import an exceptional rule opposed to the principle of law administered here—perfect freedom of contract ?

The word pre-emption is a little deluding. That was an institution known to Roman law and sanctioned an obligatory relation between the vendor and a person determined, binding the vendor to sell to that person if he offered as good conditions as the intended vendee. It arose from contract and also from provisions of positive written law (Windscheid s 388.) It was protected solely by a personal action and gave no right of action against the vendee to whom the property had been passed.

The so-called pre-emption of Mahomedan law resembles the Retract-recht (*jus retractus*) of German law. It is an obligation attached by written or customary law to a particular status which binds the purchaser from one obliged to hand over the object matter to the other party to the obligation on receiving the price paid with his expenses. The action in German as in Mahomedan law is exercisable at the moment at which the property is handed over to the purchaser (Gerber s 175, et seq. Deutsch-Priv-Recht.)

1870. December 7. R. A. No. 68 of 1870.

The right *ex jure vicinitatis* was one of six sorts and like all the rest was based upon a notion that natural justice required that such preference should be accorded to certain persons having specific relations of person or property to the vendor. It was once, as an enthusiastic Germanist admits, so used as to put the most unreasonable restraints upon the right of alienation. With more enlightened notions of the public weal, nearly every trace of it has disappeared, and it can no longer be considered a principle of the common law of Germany. While it existed the antidote to its baneful influences was, as in Mahomedan law, the favouring of subtle devices for its defeat and the attaching of short periods of prescription to its exercise. It cannot be equity and good conscience to introduce propositions which the history of similar laws shows by experience to be most mischievous. If introduced at all, it must apply to all neighbours. The Mahomedan law binds Mahomedans no more than others except in the matters to which it is declared applicable. It is then law because of its reception as one of our law sources in the matter to which it applies. Where, however, not so received, it can only be prevailing law because consistent with equity and good conscience. I am of opinion that it is manifestly opposed to both, that no such obligation in this Presidency binds a Mahomedan or any one else, and that this appeal must be dismissed with costs.

INNES, J.—I concur in the judgment of Mr. Justice Holloway.

Note.—Heimbach in Weiske's Rechts Lexicon, Vorkaufs-recht und Retract, Vol. XIII. 259.

Appellate Jurisdiction. (a)

Referred Case No. 62 *of* 1870.

S. MOONEAPPAH *against* V. VENCATARAYADOO.

An unappropriated payment is to be applied to the earliest debt, although the debt is barred by the Act of Limitation, where the facts do not raise any question which might affect such priority.

1870. *December* 7. *R. C. No.* 62 *of* 1870.

THIS was a case referred for the opinion of the High Court by A. R. Virasawmy Iyer, the District Munsif of Triputty, in Suit No. 446 of 1870.

The case stated was as follows :—

In this case a question arises of appropriation of an amount paid in liquidation of the debts which the plaintiff owed to defendant, generally, neither party having appropriated the sum to any particular demand.

The present defendant sued the plaintiff in Suit No. 405 of 1870 for the recovery of a sum due under a bond; and he was met by the plea that by a general payment, not only the bond then sued on but all demands which the defendant had were satisfied. In the trial of that case the payment was found as a fact, but the plea of satisfaction by that payment of all demands was negatived. I accordingly gave judgment in favour of the present defendant on the bond he then sued upon, leaving the question of appropriation of the payment admitted undetermined.

In the present action the plaintiff claims to recover back the sum originally paid by him, alleging that at the time of payment no item was *legally* due, except that for which the defendant has obtained a judgment in Suit No. 405 of 1870. The defendant pleaded that at the time of payment there were three items of debt, viz. one for 100 Rupees due from 10th January 1867, another for a small sum due from 11th January 1867, and a third of a later date for which the Suit No. 405 was brought. That the money admitted to have been paid was expressly appropriated to the first item by the plaintiff. The payment in question was made on 19th June 1870, that is to say, more than three years after the first item became due.

(a) Present ;— Holloway, Acting C. J., and Innes, J.

1870. *December* 7. *R. C. No.* 62 *of* 1870.

The express appropriation by the plaintiff of the payment having been negatived in the former suit, the defendant was not at liberty to re-open that question; and the item in question stands to this day unappropriated in the defendant's accounts. For the purpose of determining this action, the payment must be taken to be unappropriated by either party.

It was found also that the defendant's first claim is genuine.

Upon these facts I decided that the payment in question ought, in the absence of appropriation by either party, to be appropriated towards the liquidation of the earliest of the items, viz. the defendant's first claim for 100 Rupees, which arose on the 10th January 1867, subject to the opinion of the High Court.

The question submitted for the consideration of the High Court, is, whether according to law, the Court has power to appropriate the payment made generally to an item, which, at the time of payment, is not enforcible in a Court of law, it being barred by the Law of Limitation.

Such an appropriation as that under consideration in this case, when actually made by the creditor, has been upheld. The debt, though its recovery by a suit is barred, is still owing, and the Court in appropriating the item, as has been done, is doing what the parties are in conscience bound to do, and, in my humble opinion, does not contravene the provisions of the written law.

No Counsel were instructed.

The Court delivered the following

JUDGMENT:—The simple question is to what debt an unappropriated payment is to be applied?

The answer is to the earliest debt.

There is no question here of facts which might affect such priority.

Appellate Jurisdiction. (a)

Referred Case No. 61 *of* 1870.

MADUTHAN and 3 others

against

SUBBIER and 6 others.

The plaintiffs sued the defendants in the Small Cause Court to recover the value of certain nets, the property of the plaintiffs, of which the defendants had taken wrongful possession, and damages for the loss sustained by the plaintiffs in that they were unable to carry on their business as fishermen by reason of the detention of their nets by the defendants.

Held, that the Small Cause Court had jurisdiction to entertain the suit.

1870. *December* 7. *R. C. No.* 61 *of* 1870.

THE following was a case referred for the opinion of the High Court by H. W. Bliss, the Acting Judge of the Court of Small Causes of Cuddalore, in Suit No. 701 of 1870:—

This was a suit to recover the value of certain fishing nets wrongfully taken by the defendants from the possession of the plaintiffs and not restored, and for damages for the loss sustained by the defendants through their inability to follow their pursuit as fishermen whereby they gain their living in consequence of the said wrongful action of the defendants in taking away their nets.

The defence was—

1st. The nets were at once returned.

2nd. That the damages claimed were excessive.

3rd. That the Small Cause Court had no jurisdiction to award damage in this case since they were not actual pecuniary damages.—(Vide Clause 3, Sec. 6, Act XI of 1865.)

The case was heard before me on the 9th day of November 1870, and a decree has been passed in favor of the plaintiff, for first, the value of the nets, Rupees 24-4-0, and second, damages Rupees 28, subject to the decision of the High Court upon the following case:—As appears from the plaint, and indeed may be said to be admitted by the defendants, the only damage which plaintiffs have sustained is that, after the wrongful taking away by the defendants of their fishing nets, they were unable to carry on their usual trade, and though it is not admitted by defendants, it appears

( ) Present :— Holloway, Acting C. J. and Innes, J.

that the plaintiffs were too poor to provide themselves with fresh nets, and that consequently they say they have sustained actual pecuniary damages resulting from the tortious acts of the defendants. Upon the foregoing facts I was of opinion that, as plaintiffs had been prevented from earning money by the defendants, the Court had jurisdiction to entertain the suit. The question being one as to jurisdiction, I request the decision of the High Court upon the following points:—

1st. Whether in order to give Small Cause Court jurisdiction under Clause 3, Section 6, Act XI of 1865, it is necessary that plaintiffs should have been put to an actual disbursement of money or whether an incidental loss of possible gain of money which they have been prevented from earning will give the Court jurisdiction?

2nd. In the event of the decision of the High Court being that the Small Cause Court had not jurisdiction to award the damages sued for, whether the value of the nets being below the jurisdiction of the Small Cause Court and within that of the District Munsif, the Small Cause Court has power to adjudge their delivery or value?

No Counsel were instructed.

The Court delivered the following

JUDGMENT:—The proper answer is that the Court has jurisdiction. Whether possible gain is an element to be taken into account is a question differently answered by different systems of law, and the Judge must deal with that question for himself, as we do not understand it to be referred.

Appellate Jurisdiction. (a)

Special Appeal No. 213 *of* 1870.

KANKATALA CHELLAMAIYA..........*Special Appellant.*
POLESHETTI PAPAIYA...............*Special Respondent.*

Although a Commissioner's Report should have very great weight attached to it, it is not absolutely binding.

Vencata Reddi *v.* Venkatarámaiya, 1, *High Court Reports,* 418, dissented from.

1870. *December* 7. *S. A. No.* 213 *of* 1870.

THIS was a special appeal against the decision of H. Morris, the Civil Judge of Rajahmundry, in Regular Appeal No. 157 of 1869, confirming the decree of the Court of the Principal Sadr Amin of Rajahmundry, in Original Suit No. 3 of 1868.

This was a suit to recover Rupees 1,871-5-9, principal and interest due on an adjustment of accounts.

The plaintiff stated that, on his leaving his village to reside for some years in one of the Southern Districts on December 16th, 1856, the defendant entered into a contract, which was reduced to writing on a cadjan leaf, agreeing to act as the plaintiff's agent, receiving a commission of two per cent. on all articles of merchandise received from the plaintiff, and a commission of one per cent. on all articles purchased for him. An adjustment of accounts took place on March 7th, 1865, after the plaintiff's return, when a balance was found due from the defendant, which he has since refused to pay.

The defendant denied the cadjan account, and pleaded that the plaintiff owed him Rupees 364-4-6, instead of his owing anything to him.

The Principal Sadr Amin considered that the cadjan contract A. was genuine, but the parties agreed that the defendant should receive only one per cent. as commission on all articles of merchandise purchased for him. The Principal Sadr Amin appointed a Commissioner under Section 181 of the Code of Civil Procedure to examine the accounts of both parties, and as he reported, after examining the accounts in the presence of the parties, that Rupees 411-15-11 were due from the defendant to the plaintiff together with

(a) Present :—Holloway, Acting C. J. and Innes, J.

1870. December 7. S. A. No. 213 of 1870.

interest at 12 annas per cent., the Principal Sadr Amin gave judgment in favor of the plaintiff for that amount with costs.

Both parties appealed to the Civil Court against the decision.

Upon appeal the Civil Judge gave judgment as follows:—

The Principal Sadr Amin appointed a Commissioner under Section 181 of the Code of Civil Procedure to investigate and adjust the accounts connected with this suit, and both parties appeal against the report submitted by the Commissioner, on which the Principal Sadr Amin founded his judgment. The parties were present while the Commissioner made his investigation, and it does not appear from anything in the record that they made any objection in the Court below to the account which he furnished. I decline, therefore, with reference to the ruling of the High Court in the two Regular Appeals published in the *High Court Reports, Vol. I. pp.* 1, 418, to take a fresh account, or to enter into the details of the account already prepared.

The Principal Sadr Amin's decision is confirmed, and both appeals dismissed with costs.

The defendant appealed specially to the High Court.

Sloan, for the special appellant, the defendant.

Kuppuramasamy Sastry, for the special respondent, the plaintiff.

The Court delivered the following

JUDGMENT:—The decision at page 418 of the 1st Volume of the *High Court Reports* has been frequently held not law. While a Commissioner's Report should have very great weight given to it and not be capriciously deviated from, it is not absolutely binding. We are of opinion, therefore, that the Judge should decide the appeal upon the merits.

Appellate Jurisdiction. (a)

Civil Miscellaneous Petition, No. 296 *of* 1870.

V. Kristnappah ....*Petitioner.*

A prisoner in Jail under a Civil warrant is entitled to present a petition of appeal to the Court having power to hear appeals without the intervention of a Vakil.

1870. *December* 12. *C. M. P. No.* 296 *of* 1870.

APPLICATION by a prisoner in Jail under a Civil warrant praying the High Court to direct the Civil Judge to receive his petition of appeal against the order of the District Munsif's Court of Bellary.

The petition set forth that the petitioner was arrested and imprisoned in the Civil Jail of Bellary in satisfaction of a decree obtained against the petitioner in the Court of the District Munsif of Bellary, and was discharged from the Jail in consequence of the failure of the plaintiff in the suit (the judgment-creditor) to pay batta for the maintenance of the petitioner; but the petitioner was again arrested and imprisoned at the instance of the judgment-creditor for the same debt, by virtue of a warrant issued by the District Munsif of Bellary.

The petitioner presented a written application to the District Court of Bellary, which was forwarded through the Superintendent of the Jail, praying that he might be released from custody on the ground that he could not be lawfully arrested and imprisoned a second time in execution of the same decree. The Civil Judge directed that the petition should be returned to the petitioner on the ground that it could not be received as it had not been presented by a vakil.

The petitioner then applied to the High Court setting forth the above facts and others which do not bear upon the question decided.

The Civil Judge refused to receive the petition on the ground that he believed he would be acting irregularly in receiving a petition from a Civil debtor unless presented by in person or by vakil. Section 280 of the Civil Procedure Code prescribed the course to be followed by a Civil debtor in applying for his discharge, and the late Sadr Court

(a) Present:—Holloway, Acting C. J. and Innes, J.

made a ruling on that Section which had been embodied in the High Court Rules of Practice to the effect that such applications should be addressed to the Court under whose orders the Civil debtor should have been confined and should be forwarded to the Court by the Superintendent of the Jail. There was no other provision for any other petition by a Civil debtor being treated otherwise than as an ordinary petition which should be presented to the Court by the petitioner in person or by a vakil on his behalf.

1870. *December* 12. *C. M. P. No.* 296 *of* 1870.

The District Munsif of Bellary decided that as the petitioner was discharged from prison by no default of the judgment-creditor (who tendered the batta at the Jail, but was informed that as it was then "vacation time," the batta could not be received there, but must be paid through the Court) he was liable to be imprisoned again in execution of the decree.

No Counsel were instructed.

The Court delivered the following

JUDGMENT:—It appears to us that the petitioner could, through petition, without the intervention of a vakil, have brought his case before the Munsif's Court, and there seems no reason why the same rule should not apply to an appeal by a person in confinement to the Court having power to hear appeals from the order which placed him there.

Appellate Jurisdiction. (a)

Referred Case, No. 64 *of* 1870.

SOOBBA TEVAN *against* MOOTHOOKOODY and another.

The plaintiff sued the defendant his wife and her father (1st and 2nd defendants) to recover damages for the non-performance of a contract whereby the defendants agreed to deliver to the plaintiff a specified quantity of grain.

The plaintiff and the 1st defendant appeared before a punchayet composed of members of their caste, and, the 1st defendant having refused to live any longer with the plaintiff, the punchayet awarded the compensation claimed, and the defendants promised to deliver the grain. It was found that the award of the punchayet was in accordance with the custom of the caste in cases in which the wife refused to live with the husband.

Held, that the plaintiff was enabled to maintain the suit.

1870. *December* 19. *R. C. No.* 64 *of* 1870.

THIS was a case referred for the opinion of the High Court by P. Cabalya Pillay, the District Munsif of Streevilliputtoor, in Suit No. 663 of 1870.

The case was as follows :—

The plaintiff, as the husband of the 1st defendant, brings this suit for the recovery of damages against his wife and her father the 2nd defendant under the following circumstances :—

The plaintiff and 1st defendant lived together in harmony for some years after their marriage; misunderstanding having then arisen between the parties, they resorted to a punchayet composed of their caste men; the 1st defendant upon being asked about her wishes told the punchayet that she would not any longer live with her husband, and both the defendants further agreed to pay the plaintiff 35 fanams and 3½ cottahs of grain in a week according to the usage of the caste as compensation for the expenses incurred by the plaintiff in marrying the 1st defendant, but failed to keep to the promise. Hence the suit for the recovery of the above sum and the value of the grain.

The defendants admitted that the 1st defendant has been living in her parents' house for some time past owing to the ill-treatment received from her husband, but denied that they ever resorted to punchayet or agreed to pay compensation to plaintiff as alleged in the plaint.

(a) Present :—Holloway, Acting C. J., and Innes, J.

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It is proved by the evidence taken before me that the parties actually had recourse to an arbitration among their caste men; that the 1st defendant before the punchayet flatly refused to go with her husband and live with him, and offered at the same time to pay the plaintiff any amount which the punchayet may award on account of the expenses of her marriage and dower, and procure her divorce; that the punchayet thereupon adjudged her to pay 35 fanams and 3½ cottahs of grain as compensation to the plaintiff, and that the defendants agreed to pay the same in a week. It is also shown by the evidence that among the Marava caste, to which the parties belong, it is usual for a wife, who separates from her husband of her own accord, or who has been put away by the husband for misconduct, to pay compensation to the husband, and that there are three different rates of compensation, the lowest being the one awarded in the present case.

The 1st defendant, at the hearing, offered to live with her husband, but the plaintiff represented that this offer was not earnest, but was made merely to evade the consequences of this suit, and that he was not willing to take her back, as he had no faith that she would live with him for any length of time.

The questions submitted for the decision of the Honorable the Judges are

1st.—Is the plaintiff legally entitled to the damages claimed ?

2nd.—Is he bound to take back his wife, who now consents to live with him, and forego his claim ?

I can find no authority in Hindu law for award of damages to a husband from his separated wife in the nature of compensation for marriage expenses. Sir Thomas Strange in his Treatise on Hindu Law, 4th Edition, Volume I, page 52, says that in the lowest classes a divorce is attainable between a husband and wife provided it is allowed by the custom of the caste; but beyond this, there is no provision for award of damages consequent on the divorce.

It is, however, amply proved by the evidence in this case that by the usage of the caste to which the parties belong

1870. December 19. R. C. No. 64 of 1870.

damages are awarded to a deserted husband from the wife. That such custom exists was admitted by the defendants themselves, and it was further allowed by them that the 1st defendant procured her separation from her first husband (the plaintiff being her second husband only) by payment of compensation for marriage expenses and dower to the amount of 35 fanams and 3½ cottahs of grain. I am, therefore, of opinion that upon the facts and custom proved, the plaintiff is entitled to the damages claimed.

With regard to the second question it appears to me that the 1st defendant cannot now try to evade her liability for damages by offering to reside with her husband. Before a punchayet expressly convened for the settlement of the difference between the plaintiff and 1st defendant, she declined to live with her husband and preferred a divorce; she cannot be allowed to change her mind at her pleasure and compel her husband to take her back against his will.

No Counsel were instructed.

The Court delivered the following

JUDGMENT:—In this case the Judge has found that there was a complete divorce. To compel plaintiff, therefore, to take back 1st defendant would be to compel a re-marriage. The Judge has also found a promise to pay and not only is there no finding that there was anything invalid in the resulting obligation, but there is a distinct finding of a customary law creating a liability without the express promise. We give no opinion, of course, as to whether the qualities necessary to constitute a customary law existed, for this is not referred. But on the findings there cannot be the smallest doubt of the right to recover.

Appellate Jurisdiction. (a)

Regular Appeal No. 29 of 1869.

MR. C. E. MIRUS........................ ....*Appellant.*

ATMAKURU LUTCHMANA ROW and 2 others...*Respondents.*

A Civil Court has jurisdiction to determine a suit where the defendants dwell, or the cause of action arises within the jurisdiction of the Court.

THIS was a Regular Appeal against the decree of O. B. Irvine, the Acting Civil Judge of Bellary, in Original Suit No. 62 of 1867. 1871. *January 4. R. A. No. 29 of 1869.*

The plaint stated that the second defendant and one Plavali Venkatasam, the third defendant's gumastah, were concerned as drawer and acceptor to a local bill for the amount of Rupees 5,000, and the amount fell due on the 19th December 1866, when in satisfaction of this bill the second defendant drew another on the third defendant which was endorsed by the first and accepted by the third defendant. The defendants, who had become responsible for the payment of this amount, had failed to pay it though demanded. Hence this suit.

The first and second defendants put in statements denying their liability.

The Civil Judge dismissed the suit on the following grounds:—

The question now arises, whether this Court has jurisdiction to entertain the suit. The plaintiff's vakil urges that it has, because the defendants all ordinarily reside in Bellary, although at the time the bill was drawn the third defendant was residing at Madras.

(In disposing of this suit, I referred to the cases of Rajendra Row *v.* Sama Row and another, and DeSouza *v.* Coles, reported respectively in I. M. H. C. Rep. 436 and III M. H. C. Rep. 384, which in a manner are applicable to this case.)

I am clearly of opinion that this Court has no jurisdiction. By the terms of Section 3, Act XXIII of 1861, it is provided not only that the defendant must be residing or personally working for gain within the limits of the Court's

(a) Present:—Holloway, Acting C. J. and Innes, J.

1871. January 4. R. A. No. 29 of 1869.

jurisdiction, but also that the *cause of action* must have arisen within such limits.

Now in this suit, the cause of action was the failure of the acceptor (third defendant) to meet the amount of the bill *in Madras*. A reference to the bill shows that the bill was accepted in Madras and was payable at the Bank of Madras in Madras, and further that it was noted for non-payment at Madras.

For this reason, I am of opinion that this Court has no jurisdiction, and accordingly, under Section 3, Act XXIII of 1861, the plaint must be returned.

The plaintiff appealed to the High Court.

The Advocate General, for the appellant (the plaintiff.)

Parthasardhy Aiyengar, for *P. Balaji Row*, for the first respondent (the first defendant).

The Court delivered the following

JUDGMENT:—This is an appeal from a dismissal of a suit upon a Hundi on the ground of absence of jurisdiction.

The Civil Judge's construction is that the dwelling of the defendants and the arising of the cause of action within the local jurisdiction must cohere to create it. This is erroneous. Section 5 of the Civil Procedure Code shows that either one or the other will give jurisdiction, and accordingly Section 3, Act XXIII of 1861, requires the absence of both to justify the dismissal of the plaint.

As it is alleged, and apparently not disputed, that all the defendants dwell within the jurisdiction, this observation is sufficient to dispose of the case.

We will not, therefore, unnecessarily enter upon the question of localizing the cause of action. What that cause is has exhibited new divergence of opinion in the Courts at Westminster since the impossibility of reconciling their decisions was adverted to in *DeSouza* v. *Coles* (see and compare *Allhusen* v. *Malgarejo, Law Rep. III. Q. B.* 340 with *Jackson* v. *Spittal*, *L. R. V. C. P.* 542).

The decision of the Civil Judge upon this preliminary point must be reversed and the case remanded for decision upon the merits. The costs of this appeal will be provided for in the revised decree.

Appellate Jurisdiction. (a)

Referred Case No. 43 *of* 1870.

G. LEE MORRIS, Esq., Manager and Receiver of the Estate of His Highness the late Máharájah of Tanjore

against

SAPAMTHEETHA PILLAY.

The plaintiff sued the defendant to recover rent due upon a muchilka executed by the defendant. The defendant admitted that he occupied the land under the express contract contained in the muchilka. The muchilka was a document, the registration of which was compulsory under the Registration Acts, but was not registered.

Held, that the plaintiff could not establish his case without putting the muchilka in evidence, and it was inadmissible, not having been registered.

The period during which a suit is pending in a Court not having jurisdiction is to be excluded from the period of limitation provided by Act XIV of 1859, and the fact that the second suit, in bar of which the Act is pleaded, was instituted before the Court not having jurisdiction disposed of the first suit, is immaterial.

1871. *January* 9. *R. C. No.* 43 *of* 1870.

THIS was a case referred for the opinion of the High Court by V. Ramasami Aiyer, the District Munsif of Trivadi, in Suit No. 789 of 1869.

This is a suit brought on the Small Cause Side for recovery of Rupees 46-6-11, as rent due for Fusly 1275 on certain lands leased out to the defendant under the terms of a pattukut muchilka executed by him on the 8th June 1865.

The defendant, admitting that he cultivated and enjoyed the said lands in Fusly 1275, pleads that the suit is barred by lapse of time, and that the muchilka not having been duly registered the plaintiff is not entitled to recover.

The case came on for hearing before me on the 2nd day of December 1869, when the counsel for the plaintiff having represented that the amount sued for was included in a plaint which the plaintiff had presented to the Court of Small Causes at Combaconum against this defendant, and that the muchilka sued on had been filed in the said Court, I had to adjourn the hearing from time to time to the 4th July 1870, in order to enable the plaintiff's counsel to ascertain the result of the said plaint and produce the muchilka.

(a) Present:—Scotland, C. J. and Holloway, J.

1871. January 9. R. C. No. 43 of 1870.

On the 4th July 1870 the plaintiff's counsel having produced the muchilka, as well as the plaint that had been presented to the Court of Small Causes, with an endorsement made by the Acting Judge of the said Court upon the said plaint, under date the 22nd June 1870, I have adjourned for further consideration subject to the decision of the High Court upon the following case.

The facts of the case are as follows :—

The plaintiff presented two plaints against the same defendant, one to the Court of Small Causes at Combaconum on the 30th June 1869, for recovery of the amount of rent due for Fuslies 1274 and 1275, and the other to this Court on the Small Cause Side on the 28th July 1869, for recovery of the rent due for Fusly 1275 only, under one and the same muchilka. The plaint presented to the Court of Small Causes was returned to the plaintiff by the Acting Judge with an endorsement made thereon, under date the 22nd June 1870, to the following effect, viz :—"The claim for Fusly 1274 is barred, "and that for Fusly 1275 not within the cognizance of this "Court," while the plaint presented to this Court for the recovery of the rent due for Fusly 1275 was filed in No. 789 of 1869, which is the subject of this reference.

The defendant, admitting that he cultivated and enjoyed the lands referred to in the muchilka, pleads, firstly, that the suit is barred by lapse of time, and secondly, that the muchilka not having been duly registered, the plaintiff is not entitled to recover.

In regard to the first plea, the counsel for the plaintiff urges that though the muchilka sued on provided for the payment of rent by the defendant according to the kistbandi or instalments which the Palace authorities of Tanjore might fix, no such instalments were ever fixed, and that the defendant had time allowed up to the end of Fusly 1275 to pay the rent. While, on the other hand, the defendant has adduced no evidence to show that any instalments were ever fixed.

Hence, the rent due for Fusly 1275 became payable, and the cause of action arose on the 30th June 1866, *i. e.*, the end of the said Fusly, and the period of three years pre-

scribed by Clause 8, Section 1, of the Limitation Act, to suits for rent, expired with the 30th June 1869, on which date the plaint to the Court of Small Causes was preferred by the plaintiff for the recovery of the rent due for Fuslies 1274 and 1275. As, however, the said plaint, which as regarded the rent of Fusly 1275 was preferred in time, was pending before the said Court up to the 22nd June 1870, and as the plaint for the recovery of the rent of Fusly 1275 has been presented to this Court on the 28th July 1869, *i. e.*, during the pendency of the first mentioned plaint, which, I consider was instituted in good faith and with due diligence, and which as regarded the rent of Fusly 1275 was only dismissed for defect of jurisdiction, I was of opinion that, under the spirit of Section 14 of the Limitation Act, this suit was not barred on the 28th July 1869 when it was preferred, because under the provisions of Section 14, a plaintiff instituting a second suit after the dismissal of the first for defect of jurisdiction would be entitled to exclude from the computation of the period of limitation the whole of the time during which the first suit was pending.

In respect of the second plea set up by the defendant, I was of opinion that the muchilka on which the suit is brought, being in the form of a lease of immoveable property for a period exceeding one year, was certainly an instrument registrable under Section 13 of Act XVI of 1864 which was then in force, and that, though the muchilka cannot be received in evidence, the plaintiff was entitled to recover upon the defendant's admission that he cultivated and enjoyed the lands referred to in the muchilka in Fusly 1275.

The questions for the decision of the High Court are :—

I. Whether this suit, instituted as it is in this Court after the expiration of the period of limitation prescribed by Clause 8, Section 1 of the Limitation Act, was exempted from the operation of the said clause by reason of the same having been instituted during the pendency of another plaint, which was preferred to the Court of Small Causes for the same cause of action within the period of limitation prescribed by the said clause, and which, long after the institution

1871. January 9. R. C. No. 48 of 1870.

of this suit, was dismissed by the said Court for defect of jurisdiction, and

II. Whether the non-registration of the muchilka would operate as a bar to the plaintiff's recovering upon the defendant's admission that he cultivated and enjoyed the lands therein referred to in Fusly 1275 for which rent is claimed.

A translation of the muchilka is herewith submitted.

Pursuant to the directions of the High Court the district Munsif made the following further statement:—

In accordance with the remarks made by the High Court in the judgment passed in the above case, under date the 8th November 1870, I beg leave to make the following amendment in regard to the point which assumes that the document (exhibit A) is not receivable in evidence because not registered.

The land referred to in the document is entirely exempt from the payment of land revenue to Government. It forms part of a "mocassa maniem" estate belonging to the Palace authorities of Tanjore and liable to a payment of Rupees 13-8-7 in the shape of road cess to Government. The registration of the document was therefore compulsory, and the document not having been registered was not receivable in evidence, under Section 16 of Act XVI of 1864, which was in force when it was executed.

The following is a translation of the muchilka:—

Pattukattu muchilka executed to the Dewanum of Máharája Rájastri Surfoji Rájah Sahib Avergul by Sapamtheetha Pillay, son of Vadamalai Pillay, residing at Kundyur, for punja lands, on the 8th June 1865.

Having obtained on rent on the 1st July of Fusly 1274 and holding enjoyment of mahs 3 and gulies 6, consisting of two lots situated to the west of the high road, and mah 1 and gulies 12½ being the lot situated to the east of the road, making together mahs 4 and gulies 18½ situated on

the southern bank of the river Kodamuruti and forming part of the Kundyur garden estate at the rate of Rupees 7½ per gulies 100 or Rupees 31-6-3 per Fusly; I do hereby undertake to pay rent at the rate of Rupees 13-6-3 per Fusly for three Fuslies, viz., from the 1st July of Fusly 1274 to the 30th June of Fusly 1276 on the following conditions, viz., I shall cultivate the said lands with plantains, &c., and plant wild sugar canes, &c., by the side of the river for the safety of the bank. I shall also pay rent at the above rate for the land whereon the said canes are planted. I shall further pay Rupees 2½ per cent. on the two items aforesaid on account of sundry collections. I shall pay the aggregate amount of rent punctually and every year by the kistbandi (instalments) which the Palace authorities might fix. Should I cultivate more lands than what is stated above, I shall pay the proportionate rent due thereon. Should I fail to do so, I bind myself to make it good from my own property with interest at 1 per cent. from the date following the date of default. I should pay the rent every year whether I cultivate the land or not, and surrender the land upon the expiration of the term after taking the crops. Should I fail to take the crops even after the expiration of the term, the Palace authorities shall assume possession of the same, and I shall have no right to it. I shall pay the rent to the Divisional Kurnum and Havildar and obtain acknowledgments on the stamped katchats furnished by the Palace authorities. Should I produce any other receipts, &c., the same need not be upheld. I shall further supply with wild sugarcanes, cut and made fit for the erection of a pandal for the entertainment of Brahmins during the Saptastanum festival, the number of the canes being in proportion 2,000 to canes due on the whole of the said garden estate. After the festival is over, I shall take a moiety of the canes supplied by me, the other moiety being allowed for waste.

No Counsel were instructed.

The Court delivered the following

JUDGMENT:—We are of opinion that the District Munsif's decision on the first question submitted is right and that his decision on the second question is wrong.

1871. January 9. R. C. No. 43 of 1870.

As to the first question, under Section 14 of the Act of Limitations the time during which the suit was pending in the Court of Small Causes at Combaconum was clearly, upon the facts stated, not computable in reckoning the period of limitation. We do not think that the circumstance of the second suit having been instituted before the Combaconum Court had disposed of the first suit makes any difference as respects the application of the Section.

The second question depends upon the point whether the defendant's admission was sufficient to entitle the plaintiff to a judgment in his favor without putting in evidence the muchilka, and clearly it was not sufficient. It imports no more than that the defendant had occupied the land as tenant under the terms of the express contract contained in the muchilka. Obviously, therefore, it was necessary for the plaintiff to prove that those terms were such as to entitle him to recover the amount of rent claimed, and the muchilka was the only proper proof of that, and, being inadmissible in evidence because not registered, the plaintiff failed to establish his claim.

Appellate Jurisdiction. (a)

Referred Case No. 67 *of* 1870.

V. KITTAPPA *against* K. SOMANNA and 3 others.

In a suit by the plaintiff to recover money lent more than three years before suit, the plaintiff alleged an express verbal promise by the debtor to pay the amount sued for made upon a settlement of accounts.

***Held*, by HOLLOWAY and KINDERSLEY, J. J.—That a verbal promise was not sufficient to prevent the application of the Act of Limitation.**

Per KINDERSLEY, J.—If the debtor and creditor enter into a new contract, the debtor promising to pay a barred debt, that would seem to be a new cause of action, and it is doubtful whether it was the intention of the Limitation Act to insist that the new promise should be in writing.

THE following was a case referred for the opinion of the High Court, by C. V. Chengulva Row, the District Munsif of Bimlipatam, in Suit No. 64 of 1870 :— 1871. *January* 9. *R. C. No.* 67 *of* 1870.

This is an action of debt. The plaint alleges that one Sannayasi, father to the first and second defendants, had, on three different occasions, between the 9th October 1865 and 4th January 1866, borrowed sums of money from the plaintiff, amounting in all to Rupees 99-8-0 at 18 per cent. interest, and that the third defendant had been surety for the same. On the 18th May 1867, the obligee having delivered a garce of paddy valued at 70 Rupees, a balance of Rupees 29-8-0 was struck against him on account of the principal. The original obligee has since died, leaving some property, which the first and second defendants and fourth defendant, who is a partner in cultivation with the two former, have taken possession of. The plaintiff therefore seeks to recover from all the defendants the balance still due to him, viz. Rupees 60 as follows :—

	RS.	A.	P.			
Amount lent on the 5th Oct. 1865...	50	0	0			
„ 4th Nov. „ ...	24		0			
„ 4th Jan. 1866...	25	0	0			
				99	8	0
Interest on the above sums from their respective dates up to 18th May 1867 at 18 per cent. per annum				26	1	0
Total				125	9	0

(a) Present :—Holloway and Kindersley, JJ.

1871. *January* 9. R. C. No. 67 *of* 1870.

Deduct			
Value of one garce of paddy delivered by the original obligee on the 18th May 1867	70	0	0
	55	9	0
Interest on Rupees 29-8-0 being balance on account of principal, from the 18th May 1867 to 15th February 1870 at 18 per cent. per annum.	14	1	0
	69	10	0
Amount foregone by plaintiff	9	10	0
Balance claimed	60	0	0

The plaint was presented on the 16th February 1870.

The defendants, among other things, pleaded the Law of Limitation, and stated that under Section 4, Act XIV of 1859, an acknowledgment of debt should have been in writing to give a new period of limitation; that in the absence of such acknowledgment the limitation should be considered to run from the time when the original debt became due; that Clause 9, Section 1 of the Limitation Act, is applicable to the present case; and that, as the three years time allowed by that clause had elapsed before the date of plaint, the plaintiff's claim was barred.

It has been argued for plaintiff that in the present case, the original obligee had, when the balance was struck against him on the 18th May 1867, both acknowledged the debt and promised to pay it; that, as Section 4 of the Limitation Act does not require a promise, but an acknowledgment, to be in writing, the verbal promise made on the 18th May 1867 constituted a new contract, for which the money then due was the consideration; that the plaintiff had a fresh time of three years from that date, and that the plaint was put in within that time. In support of this, the plaintiff's Vakil relied upon a decision of the Judicial Commis-

sioner of Mysore in Referred Case No. 3 of 1869, reported at page 181 of the *Madras Jurist, Volume V.*

1871. *January* 9. *R. C. No.* 67 *of* 1870.

The defendants, on the other hand, pleaded, that to acknowledge a subsisting debt and to promise to pay it are virtually the same, and that the word promise was introduced by plaintiff merely to evade the requirements of Section 4.

The point for determination therefore is, whether a verbal promise by an obligee to pay an existing debt would constitute a new contract, so as to give the obligor a new period of limitation under Act XIV of 1859 from the date of that promise.

As the question is of importance, and one likely to be frequently raised, and as great doubts are entertained regarding it, I beg to submit it for the decision of the High Court.

The following is my own view of the matter :—

The Indian Limitation Act does not provide for any other mode of revival of right to sue in cases of legacy or debt than that laid down in Section 4 of that Act, and the following extract from the decision of the High Court in *Khavajah Mahammad Janula* v. *Venkataroyer and another, High Court Reports, Vol II, page* 81, may, I think, be consulted here with advantage. It runs thus : " Now the 4th Section of the Act provides expressly for the acknowledgment of debts that would otherwise be barred, and it gives to a written acknowledgment all the effect of a new promise giving rise to a fresh cause of suit. The reasonable construction of this Section, we think, is that a written acknowledgment alone was intended to have that effect, and that impliedly a new period of limitation is excluded in any other case." The case of *Ram Narain Choudry* v. *Bhagwam Jogey* (Thomson's Law of Limitation, Edition 1866, pp. 54, 55) is exactly in point. There " the plaintiff lent money to the defendant without receiving any written document. Payments were made to the defendant from time to time which were deducted from the account, and a balance against him was eventually struck in his presence which he orally promised to pay to the plaintiff, with interest. More than three years after date

1871. January 9. R. C. No. 67 of 1870.

of the original loan, but within three years from the date of the alleged adjustment and oral promise, the plaintiff sued the defendant for the balance of the money lent with interest. Defendant pleaded limitation, denying at the same time that he owed any balance, or that he ever adjusted accounts as stated in the plaint. It was held by the Lower Court, and on reference by the High Court (Calcutta) that the case being a suit to recover money lent fell to be disposed of under this Clause (9 of Section 1), and that when there is no written and signed acknowledgment as provided by Section 4 of this Act, the mere fact of payment having been made on account does not keep alive the claim so as to enable the creditor to bring an action after three years from the time when the debt became due." Part payment and a verbal promise to pay were both duly asserted in this case, but neither the Lower Court nor the High Court have taken any notice of the assertion of the "promise to pay," and considered the case to be fully governed by Section 4 of the Act. That shows that a verbal promise to pay an existing debt does not take the case out of the Statute.

On the other hand the decision of the Judicial Commissioner of Mysore, above referred to, clearly recognizes a difference under the Indian Limitation Act between a promise to pay and an acknowledgment, and rules that the plaintiff may sue upon a verbal promise made in consideration of the barred claim if that promise was made within the period of limitation. That a promise to pay is distinct from acknowledgment under the English Law of Limitation is a known thing, and the following extract from the judgment of the Privy Council reported at pages 335 and 336, *Madras Jurist, Volume IV*, supports this view. It runs thus: "The authorities which have been relied on in order to show that there has not been a sufficient acknowledgment within the period of limitation in the present case were cases of actions on promises decided on the Statutes of 21 James I. and 9 Geo. IV, Cap. 14. The principle of these decisions is not applicable to a case like the present. They depend not upon the effect of an exception in the Statute, but upon the principles of the Common law with respect to the cause of action. The issue joined made it incumbent on the plain-

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tiff to prove a promise made within six years, and such as to agree with that laid down in the declaration. In such cases acknowledgments, whether by words or acts, are of no avail, save so far as they sustain the promise alleged, there is no exception within which they come, and these cases are to be regarded simply as actions brought on promises made within six years. But the cases in which acknowledgments are operative by way of exception are of a different character. In these the action must be maintained on the original security, and an acknowledgment within the prescribed period of limitation shows that the obligation was then subsisting and unsatisfied, and a promise to pay is required."

Moreover, it is believed that the Legislature when framing the Indian Law of Limitation had before them the 9th George IV, Chap. 14, which was extended to the Territories of the East India Company by Act XIV of 1840, and all the other English Statutes on Limitation. The words "acknowledgment and promise to pay" are constantly met with in these Statutes, and yet the Legislature refrained from using the phrase "promise to pay" in Section 4 of the Indian Act. It may be, therefore, maintained that they have purposely left the phrase out, and that a promise to pay is not covered by Section 4.

I am, however, of a different opinion. In the 9th Geo. IV, Chap. XIV, Section 1, it was provided that "in actions of debt or upon the case grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract whereby to take any case out of the operation of the said enactments or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby." Having this enactment before them for their guidance, and considering as they did that an acknowledgment of debt which under the old Indian Law of Limitation was not necessarily to be in writing, should for the future be in writing, it is impossible to believe that the Legislature would have thought it safe to exempt

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promises to pay old debts from the necessity of being written. It may be questioned then, why did they not introduce the words 'promise to pay' into Section 4 ? The answer is, that a written promise would not be more useful than a written acknowledgment, and that the latter would be quite sufficient for all the purposes of the Limitation Law, for it is provided in Section 4 that a new period of limitation according to the nature of the original liability should be computed from date of a written acknowledgment. Besides, if a verbal promise to pay an old debt should be considered as constituting a new contract, and seeing how prone the people are to perjury, rights to sue for barred claims can be revived at any time and the object of the Limitation Act will be quite defeated.

Under these circumstances I would decide the question against the plaintiff.

No Counsel were instructed.

The Court delivered the following judgments:—

HOLLOWAY, J.—I am of opinion that this action for money lent is clearly barred. The suit is for money lent and the periods applicable are those of 9th and 10th clauses.

Section IV prescribes the only mode of extending the period. This new law had to operate upon clause 4th, Section XVIII, Regulation II of 1802, and has designedly omitted promise to pay and substituted a written acknowledgment. The promise to pay might be perfectly good evidence of an acknowledgment sufficient to satisfy the exception if it had been in writing, but in my judgment no verbal promise could have any effect whatever.

It has been decided that part payment is not enough, because the promise implied is not in writing, yet promises implied, when once the implication has been made, can have no different effect from express promises. I do not wish to say anything of the grounds upon which it is said that the new promise is a new cause of action. To assume that, here, would be inconsistent with the provision that the acknowledgment is to give a new period in accordance with the original liability, whereas the period would be, if the acknowledgment gave a new cause of action, the same in all cases.

1871. *January* 9. *R. C. No.* 67 *of* 1870.

It seems to me that the construction proposed is inconsistent with the words and the object of the Statute. In substituting a new mode of revival for that contained in the old Regulations, it distinctly narrows the mode to a written acknowledgment. I would say that the suit was clearly barred.

KINDERSLEY, J.—I understand the question put by the Munsif to be "whether a verbal promise to pay an "existing debt would constitute a new contract so as to give "the obligor a new period of limitation." The present suit being brought upon the old debt, I agree with Mr. Justice Holloway that the promise (not being an acknowledgment in writing) would not extend the period. In England it has been repeatedly held that a barred claim may be a good consideration for a promise, and if debtor and creditor deliberately enter into a new contract, the debtor promising to pay a barred debt, that would seem to be a new cause of action, and I am not sure whether it was the intention of the Limitation Act to insist that such new promise should be in writing. The question however, does not seem to arise out of the present case, in which the claim was based, not on the new promise, but on the old debt.

Appellate Jurisdiction. (a)

Special Appeal No. 420 *of* 1869.

NARAYANASAWMY NAICK..............*Special Appellant.*

SARAVANA MUDALY and 12 others...*Special Respondents.*

The plaintiff sued to establish his right to and to recover certain lands in the possession of which he had been obstructed by the defendants. The plaintiff purchased the lands at a sale held in execution of a decree obtained against the 1st and 2nd defendants in the Court of the District Munsif of Tripassore. The sale was directed by the District Munsif of Tripassore. Between the date of the decree and the sale, the village in which the lands were situated was transferred from the jurisdiction of the District Munsif of Tripassore to the District Munsif of Conjeveram.

Held, that the sale was a nullity and conferred no title upon the plaintiff: but that the plaintiff was entitled to recover from the 1st and 2nd defendants the amount of the purchase money paid by him.

1871. *January* 18. *S. A. No.* 420 *of* 1869.

THIS was a special appeal against the decision of E. B. Foord, the Civil Judge of Chingleput, in Regular Appeal No. 95 of 1867, modifying the decree of the Court of the District Munsif of Conjeveram in Original Suit No. 145 of 1866.

The plaint set forth that the plaintiff purchased at a sale by auction, ordered by the District Munsif's Court of Tripassore, half a share in the village of Aranvayal, but that while he was cultivating the lands forming the said share, the defendants from 6 to 15, at the instigation of the defendants from 1 to 5, took wrongful possession thereof. The plaintiff therefore sued to establish his right to $11\frac{1}{18}$ cawnies of land and to recover Rupees 496-10-6 on account of loss of produce.

The defence of the 1st defendant was that out of the lands claimed, cawnies 2-1-2 were not mentioned in the sale certificate of the District Munsif's Court, and that the plaintiff was not entitled thereto. He further pleaded that the plaintiff had purchased the lands at auction on his (1st defendant's) behalf.

The 4th and 5th defendants denied having taken wrongful possession of the lands.

The remaining defendants were *ex-parte*.

The District Munsif gave judgment confirming plaintiff's title to the enjoyment of the whole of the land claimed.

(a) Present:—Scotland, C. J. and Innes, J.

He adjudged that the 2nd, 4th, 5th, 14th and 15th defendants should pay plaintiff Rupees 254-12-0, on account of loss of produce. He excluded the 1st defendant from liability for loss of produce sustained by plaintiff, and the remaining defendants from any liability whatever.

1871. *January* 18. *S. A. No.* 420 *of* 1869.

The 1st defendant appealed against the decision.

It was admitted at the hearing of the appeal, by the plaintiff's pleader, that the sale certificate he obtained from the Munsif's Court only showed that 9⅛ cawnies of land were purchased by him at auction.

The Civil Judge modified the decision of the Lower Court and adjudged that plaintiff's right to 9⅛ cawnies only be established.

The plaintiff appealed specially to the High Court against the portion of the decree of the Civil Judge wherein plaintiff's claim was disallowed, on the following grounds:—

The plaintiff is entitled to the disallowed piece of land under the sale certificate.

The plaintiff is entitled to recover on the whole half of one pungu of the whole lands in the village, and unless the disallowed portion is added to the part decreed, the plaintiff's share cannot amount to the said half pungu.

Upon the hearing of the special appeal issues were sent to the Civil Court. In the return it appeared that the plaintiff purchased the land at an auction held by the District Munsif of Tripassore in execution of a decree against the 1st and 2nd defendants, and that the sale was directed after the village in which the lands were situated was transferred from the jurisdiction of the District Munsif of Tripassore to the jurisdiction of the District Munsif of Conjeeveram.

Rama Row, for the special appellant, the plaintiff.

The Court delivered the following

JUDGMENT :—Upon the first of the findings returned by the Civil Court, we are of opinion that the objection of the respondents is fatal to the plaintiff's title as purchaser under the sale in execution. After the valid transfer of the village, of which the lands in dispute form a part, from

1871. January 18. S. A. No. 420 of 1869.

the jurisdiction of the Tripassore District Munsif's Court to the jurisdiction of the Court of the Conjeveram District Munsif, the power of the former Court to issue process of execution for the attachment and sale of the land in dispute ceased. The only power which that Court then had as respects execution against such lands was that provided for by Sections 284 and 286 of the Code of Civil Procedure relating to the execution of decrees against property out of the jurisdiction of the Court passing the decree.

By the sale in the present case, therefore, no title could pass to the plaintiff from the Court of the District Munsif of Tripassore. The sale was a mere nullity: as completely so as if the Village had never been within that Court's jurisdiction.

It follows that the decrees of both the Lower Courts must be reversed. But the plaintiff is entitled to be secured the return of his purchase money, which has been paid over to the execution creditor, who is not, it appears, a party to the suit. The 1st and 2nd defendants (the judgment debtors) have had the benefit of the money so paid in discharge of their liability to the execution creditor, and it would be inequitable that they should have the restoration of the land (which is the effect of the annulment of the sale) without being bound to reimburse the plaintiff, who has not been guilty of any impropriety of conduct with respect to the execution and sale.

The decree of this Court will, therefore, order the payment to the plaintiff by the 1st and 2nd defendants of the amount of such purchase money within six weeks from the date of the decree—and also that in the event of the land being sold in execution to satisfy the said amount for more than sufficient to discharge the said debt, the balance of the purchase money, if not more than equal to the amount of the interest on the said debt at the rate of 6 per cent. per annum, or if more, so much thereof as shall be equal to the said amount, be paid over to the plaintiff.

Our decision upon this objection renders unnecessary the expression of our opinion upon the objection raised by the appellant. The parties, we think, should bear their own costs in this and both the Lower Courts.

Appellate Jurisdiction. (a)

Referred Case No. 46 *of* 1870.

RAMASAMI AIEN *against* MANJEYA PILLAI.

Section 7 of Madras Act VIII of 1865 applies to cases where the landlord is the exclusive proprietor of both the mélwarum and the mirásiwarum and the tenant has no saleable interest in the land.

1871. *January* 18. *R. C. No.* 46 *of* 1870.

THIS was a case referred for the opinion of the High Court by V. Ramasami Aiyer, the District Munsif of Trivadi, in Suit No. 193 of 1870.

This is a suit brought for recovery of Rupees 39-2-0 as rent due for the latter half of Fusly 1276, on mahs 9 and gulies 47 of nunja and punja land, held and enjoyed by the defendant in the said Fusly.

The defendant, admitting that he cultivated and enjoyed the land, pleads that, no puttah and muchilika having been exchanged in the said Fusly, the suit is not sustainable under Section 7 of the Rent Recovery Act (Madras Act No. VIII of 1865.)

The case was heard before me on the 4th day of July 1870, and was adjourned for further consideration subject to the decision of the High Court upon the following case :—

The facts of the case are as follows :—The land for which rent is claimed forms part of the estate of "Thattimal Padugai" entirely exempt from the payment of revenue to Government; and, as certified by the Collector of Tanjore in his letter to the Civil Court under date the 8th September 1870, the Palace authorities at Tanjore are the exclusive proprietors of both warums or shares thereof, viz., the mirásiwarum and mélwarum.

The plaintiff held the farm of the said estate from the Palace authorities for 3 Fuslies, viz., 1273 to 1275, and, on the 15th August 1863, sub-rented the land aforesaid to the defendant for the same period under an agreement (exhibit A) obtained from him to the effect that he should pay a rent of Rupees 78-4-0 per Fusly by two instalments, viz., Rupees 39-2-0 in September and Rupees 39-2-0 in March.

The defendant acted up to the conditions of A. up to the end of Fusly 1275, when the term of the plaintiff's farm

(a) Present :—Scotland, C. J. and Innes, J.

1871. January 18. R. C. No. 46 of 1870.

as well as the defendant's sub-rent expired together; but the defendant, however, continued to hold possession of the land in Fusly 1276, while the plaintiff again became the farmer of the said "Thattimal Padugai" estate for Fuslies 1276 to 1278 under a document obtained by him from one Rama Mupen, to whom the Palace authorities had leased it out for those Fuslies.

Now the plaintiff, as farmer of the said estate for Fuslies 1276 to 1278, sues to recover Rupees 39-2-0 as rent due for the latter half of Fusly 1276, alleging that, notwithstanding the expiration of the term limited in A, the defendant held and enjoyed the land in Fusly 1276 and was therefore liable to pay rent at the rate fixed in A, and that the rent due for the first half of the said Fusly became barred by lapse of time.

The defendant allows that he cultivated and enjoyed the land in the said Fusly, but pleads that the suit is barred by Section 7 of the Rent Recovery Act, no puttahs and muchilikas having been exchanged

The counsel for the plaintiff admits that in Fusly 1276 no puttahs and muchilikas were exchanged, tendered, or dispensed with in the manner prescribed by the said Section, and that the plaintiff took no lease or agreement in writing from the defendant specifying the rent to be paid by him in respect of the said land, but argues, 1stly, that Section 7 of the Act had no application to cases wherein the landlord was himself the proprietor of both warums of the land, and the tenant had no interest whatever in the soil, and 2ndly, that the defendant having cultivated and enjoyed the land in Fusly 1276, *i. e.*, after the expiration of the term of his sub-rent, was liable to pay rent at the rate fixed in A.

On the other hand the counsel for the defence contends that, no puttahs and muchilikas having been exchanged in Fusly 1276, he was not a person bound to pay rent to the landlord within the meaning of Section 1 of the Act.

Upon the foregoing facts and arguments, I was of opinion that the position of the Tanjore Palace authorities with respect to the land in question was either that of a Jaghirdar or Inamdar referred to in Section 1 of the Act; that the plaintiff, being confessedly a farmer of the said land from the said

Palace authorities, was a landholder within the meaning of the said Section, and, as such, was bound by Section 3 of the said Act, to exchange puttahs and muchilikas with his tenants, and that the plaintiff's counsel having admitted that no puttahs and muchilikas had been exchanged, tendered, or dispensed with in Fusly 1276, the suit was not sustainable against the defendant under Section 7. I was further of opinion that, whether the defendant had or had not a saleable interest in the land, he was still a tenant within the meaning of Sections 1 and 38 of the Act, and that even assuming that Section 7 had no application to cases wherein the landlord was the exclusive proprietor of both warums, the bare admission of the defendant that he cultivated and enjoyed the land in Fusly 1276 would not entitle the plaintiff to recover, the latter having failed to take any lease or agreement in writing from the defendant specifying the rent to be paid by him for that Fusly, as prescribed by Section 13.

1871. *January* 18. *R. C. No.* 46 *of* 1870.

The questions for the decision of the High Court are

I. Whether Section 7 of the Rent Recovery Act (Madras Act No. VIII of 1865) has application to cases wherein the landlord was the exclusive proprietor of both the mélwarum and mirásiwarum thereof and the tenant had no saleable interest in the soil.

II. If Section 7 had no application, would the bare admission of the defendant that he cultivated and enjoyed the land in Fusly 1276 entitle the plaintiff to recover rent for that Fusly, in the absence of any such lease or agreement in writing as is prescribed by Section 13 of the Act.

No Counsel were instructed.

The Court delivered the following

JUDGMENT:—This is a suit to enforce payment of rent claimed to be due by the defendant as tenant to the plaintiff. We have no doubt that, with respect to the right to maintain such a suit, the plaintiff is one of the landlords to whom Section 7 of Madras Act VIII of 1865 is applicable. He comes literally within the first of the two interpretations of "landholders" in Section 1, and every such landholder is required by Section 3 to enter into written engagements by puttah and muchilika with his tenants; and

1871. January 18. R. C. No. 46 of 1870.

to all suits brought to enforce the terms of a tenancy, in cases in which puttahs and muchilikas should have been exchanged in compliance with Section 3, the provisions of Section 7 are applicable.

We find nothing in the Act to warrant the distinction attempted to be made at the hearing before the District Munsif with respect to landlords who have the right to both the mélwarum and mirásiwarum.

We have no doubt also that, whatever be the nature of a tenancy created by a landholder who is within Section 3, a suit to enforce its terms is subject to the enactment in Section 7.

We therefore return an opinion in the negative on the first question submitted, and, as the second question is conditional upon Section 7 having no application to the case, it is unnecessary to consider it.

We do not think that the agreement under which defendant held (exhibit A) can be said to be impliedly a continuing contract of tenancy with the plaintiff under his new lease. Its operation, we think, terminated with the former lease to the plaintiff under which it was granted.

Appellate Jurisdiction. (a)

Regular Appeal No. 31 *of* 1870.

ANNAVUNADAVAN ... ... *Appellant.*

IYASAWMY PILLAI and 4 others... *Respondents.*

The plaintiff sued to recover certain land which had been hypothecated to him in 1843, and subsequently sold to him in 1868, while under attachment in execution of a decree in a suit brought by the plaintiff to establish his hypothecatory claim. The 3rd defendant claimed under a mortgage prior in date to the hypothecation to the plaintiff, and under a sale prior in date to the sale to the plaintiff, made to the 3rd defendant whilst the land was under attachment in execution of the decree to the plaintiff.

Held, that the sale to the 3rd defendant, which was made not under any agreement with the plaintiff for the satisfaction of the decree through the Court, was invalid by reason of Section 240 of the Civil Procedure Code; but that the alienation to the plaintiff, the decree holder, during the attachment to satisfy the decree, which was duly sanctioned by the approval of the Court which issued the process of attachment, was valid.

THIS was a Regular Appeal against the decision of W. M. Cadell, the Acting Civil Judge of Trichinopoly, in Original Suit No. 40 of 1868. 1871. *January* 18. *R. A. No.* 31 *of* 1870.

The suit was for the recovery of lands together with the mesne profits accruing thereon, the value being estimated at Rupees 1,146-12-2.

The plaintiff asserted that one Letchumana Pillai, a divided uncle of the 1st and 2nd defendants, in the year 1843 executed two bonds of hypothecation to the plaintiff's father, and died sometime afterwards issueless; that the 1st and 2nd defendants then became his heirs, when the plaintiff sued them, in Suits Nos. 78 and 79 of the late Sadr Amin's file, for the amount of these bonds, and obtained decrees in his favor; that subsequently plaintiff got the property specified in the bonds attached in satisfaction of the decrees, when the 3rd defendant put in a petition alleging that he had purchased the lands from one Comaravanathriyan; that this petition was rejected, and that the 3rd defendant again instituted the suit, Original Suit No. 26 of 1862, to establish his right; that the suit was, however, dismissed, as also the Appeal Suit therefrom, No. 74 of 1865; that the plaintiff then again applied for execution against the lands, when the 3rd defendant presented a petition along with an agreement,

(a) Present:—Scotland, C. J. and Innes, J.

1871. January 18. R. A. No. 31 of 1870.

and promising to pay up the amount due, but this petition was again rejected; and that the 1st and 2nd defendants having, on the 28th April 1868, sold the lands hypothecated to the plaintiff for the decree amount, the property was released from attachment, but as the defendants remained in forcible possession of the property, and the 3rd and 4th defendants had assisted in carrying away the produce—hence the suit was instituted.

The 1st defendant in his answer contended that only Rupees 1,020-1-0 were due under the two decrees passed in Suits 78 and 79 of 1854 of the Sadr Amin's Court, viz., Rupees 512-11-0 in No. 78, and Rupees 507-6-0 in Suit No. 79; that it was agreed in the presence of certain persons that the lands hypothecated were to be sold for Rupees 2,000, and that after deducting therefrom the sum of Rupees 1,020-1 due by him (1st defendant), the remaining sum of Rupees 979-15-0 was to be paid him by the plaintiff; that although the deed of sale was accordingly drawn up, still the same had not been formally completed, and that the allegation of the plaintiff that the sum of Rupees 2,000 was due under the said decrees was altogether false.

1st defendant further expressed his willingness to abide by the said deed, provided he was paid the sum of Rupees 979-15-0, failing which he prayed the deed might be declared to be null and void.

The 3rd defendant asserted that the land claimed in the plaint originally belonged to Letchumana Pillai, the divided uncle of the 1st defendant; that it was first mortgaged in the year 1838, and finally sold with certain other lands to one Comaravanathriyan in the year 1846 for the sum of Rupees 1,000; that the said Comaravanathriyan, who was enjoying the lands up to the year 1860, then sold them to him, 3rd defendant, for the sum of Rupees 1,500, and also put him in possession, together with the title-deeds, and that he (3rd defendant) had ever since enjoyed the same; that after the death of Letchumana Pillai his brother Muthucaruppa Pillai (who was also the 1st defendant's father) inherited the deceased's property under Hindu Law, and was thus alone the owner thereof, but not the 2nd defendant.

That the 1st defendant had not only in the year 1857 executed an agreement to the said Comaravanathriyan supporting his right to the said land, but had also subsequently enjoyed a portion thereof on mortgage and sale.

That although the suit, Original Suit No. 26 of 1862, brought by him in this Court for the release from attachment of the lands specified in the plaint, was dismissed, the sale-deed of 1846 was not proved, still the 1st defendant admitted the genuineness of the deed, and that the same was therefore valid.

That subsequent to the dates of the original and appeal decrees, or in September 1866, the 1st defendant had executed an agreement to the 3rd defendant, which had been registered, declaring the sole right of the 3rd defenoant to the lands in question, and that, therefore, the sale of the lands in the year 1868, as alleged by the plaintiff, could not be held to be valid.

That the suit was barred by the Law of Limitation, and that the plaintiff's purchase was altogether invalid, inasmuch as the seller was not in possession of the property sold since the year 1846.

The following were the issues directed by the Court to be tried on the 15th July 1869.

1st issue to prove that the sale to the plaintiff was duly made, and that the full amount of consideration as specified in the sale-deed was given.

The 2nd issue was whether the suit was barred by the Limitation Act.

The Civil Judge delivered the following Judgment :—

In this case it seems unnecessary to go at length into all the evidence adduced by the parties, the main point for decision being simply, was the sale of the property to the plaintiff a good and valid transaction or the contrary.

To support his claim, the plaintiff has produced ten exhibits, but it rests mainly if not entirely on the document, exhibit A, and the evidence adduced in support of it.

The plaintiff has cited six witnesses, of whom two speak as to the execution of the document in question, but even these admit that no consideration at all was paid at the time,

1871. January 18. R. A. No. 81 of 1870.

and all the six concur in stating that the land sold was at the time not in possession of the 1st, but of the 3rd defendant, and that for a series of years.

It is also proved by the evidence of the witnesses for the 3rd defendant that in the year 1866, he, 1st defendant, resigned altogether his claim to the land and executed an agreement, exhibit VIII, to that effect. This he denied in his examination, but in the Sessions just closed he has been tried and found guilty of giving false evidence in making such denial, and yet two years afterwards, he sells again land to which, and by his own deliberate act, he has altogether forfeited his claim.

It must also be observed that the 1st defendant has been committed to take his trial for deliberate and wilful perjury in denying certain documents to which his signature was affixed, and there can be but little doubt but that this suit has been brought in collusion with him.

The Court is, therefore, of opinion that the plaintiff is only entitled to receive the sum of Rupees 905 from the 3rd defendant, under the terms of document exhibit VIII, as awarded in Original Suits Nos. 78 and 79 of 1854.

Each party to bear their own costs.

The plaintiff appealed to the High Court at Madras against the decree of the Civil Judge for the following reasons :—

1st. The decree of the Civil Judge is against the weight of evidence and contrary to law.

2nd. The Civil Judge has misapprehended the real points in the case.

3rd. The document A is valid and binding.

Miller, for the appellant, the plaintiff.

The Court this day delivered the following

JUDGMENT :—In this case plaintiff sues to enforce a sale of property which had been hypothecated to his father in 1843, and subsequently, while under attachment in execution of decrees 78 and 79 which had established plaintiff's hypothecatory claim, sold to plaintiff by the heirs of the original judgment-debtor for the decree amount. This sale was

1871. January 18. R. A. No. 31 of 1870.

made in 1868. The first defendant contended that a certain portion of the consideration for the sale was still due. 3rd defendant set up a mortgage of the property in 1838 by the uncle of 1st defendant to a third person Comaravanathriyan, to whom in 1846 it was sold. He said that this person enjoyed till 1860, when he sold the property to 3rd defendant, and that he has since been in enjoyment of it; that in 1857 the title of his vendor was admitted by 1st defendant in an agreement in writing, and that although the Suit No. 26 of 1862, brought by him to set aside the attachment made in execution of the decrees 78 and 79, was dismissed on the ground that the execution of the deed of sale in 1846 was not proved, still, as 1st defendant had in 1866 executed and registered an agreement in 3rd defendant's favour, acknowledging his title, the subsequent sale to plaintiff in 1868 was ineffectual to pass the property.

The Civil Judge dismissed the plaintiff's claim to the property, considering (as we understand the language of his judgment) that he had failed to prove payment of the consideration for the sale, and, therefore, no title passed by the instrument of sale in 1868, but decreed payment to him by the 3rd defendant (to whom the Civil Judge seems to have held that the 1st defendant's title passed under the document, exhibit 8) of the sum which he found due under the decrees in the suits 78 and 79 of 1854.

No attempt has been made on the part of the respondents to resist the appellant's objection that the Civil Court erred in holding the instrument of sale to the plaintiff (exhibit A) invalid:—and it is clear that, being a fully perfected sale for a valuable consideration, the non-payment of the balance of the consideration, after deducting the amount due under the decrees, is not a ground for invalidating the effect of the instrument as a transfer of the vendor's right.

The first question for determination is, whether the 3rd defendant became entitled to the land in dispute under the document (exhibit 8) subject to the payment of the plaintiff's mortgage debt, his claim through Comaravanathriyan being concluded by the decree in the Suit No. 26 of 1862. Now, assuming that document to be in terms a fresh transfer of the 1st defendant's right, it clearly had no such legal opera-

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tion by force of Section 240 of the Code of Civil Procedure. It appears to have been effected while the plaintiff's attachment of the property was in operation and not under any agreement with the plaintiff for the satisfaction of the decree through the Court: and that Section declares that any private alienation of the property attached whether by sale, gift, or otherwise during the continuance of the attachment shall be null and void. The 3rd defendant's claim of title therefore must be set aside.

The second question is whether the Section does not also invalidate the instrument of sale to the plaintiff, the attachment being still in force at the time of its execution. That would no doubt be its effect if the words used be given a strictly literal application. But we are of opinion that the words " any private alienation" were not intended to apply to an alienation effected with the acceptance of the decree-holder to satisfy the decree and duly sanctioned by the approval of the Court which issued the process of attachment. This is clearly shown, we think, by Section 245 of the Code providing for the withdrawal of an attachment upon satisfaction of the decree otherwise than by payment of the amount decreed and all costs and charges into Court. Under this provision an alienation of the property under attachment, accepted by the decree-holder in satisfaction of the decree, may, after execution, be sanctioned by the Court, and an order thereupon made for the withdrawal of the attachment. An alienation so sanctioned cannot therefore be considered as one to which Section 240 was meant to be applicable. As then the instrument of sale and transfer to the plaintiff was duly submitted to the Civil Court, and satisfaction of the decree thereupon entered in the record by the Court, it operated, in our opinion, as a valid conveyance of the vendor's title to the plaintiff. For these reasons, the decree of the Court below must be reversed and possession of the land in question decreed to the plaintiff. The decree must also direct an enquiry in execution as to the amount of mesne profits to which the plaintiff is entitled down to the execution of the decree, and order payment of the amount found due. The appellant, we think, should have his costs throughout.

Appeal allowed.

Appellate Jurisdiction. (a)

Regular Appeal No. 75 of 1870.

SUKRY KURDEPPA and another..............*Appellants.*

GOONDAKULL NAGIREDDI and 3 others ....*Respondents.*

A document creating and transferring a right of use of growing trees for a term of years is a document which purports to create or transfer an interest in immoveable property within the meaning of Section 13 of the Registration Act of 1864; and therefore such document, if not registered, is inadmissible in evidence.

THIS was a regular appeal against the decision of O. B. Irvine, the Acting Civil Judge of Bellary, in Original Suit No. 25 of 1869. 1871. *February 7.* *R. A. No. 75 of* 1870.

The plaintiffs sued to have their right established to, and to be put in possession of, and to draw toddy from certain toddy trees specified in the plaint, for a term named in a lease alleged to have been executed in their favor on the 15th October 1869 by the 2nd defendant. The plaint set forth that the 2nd defendant derived his title from a previous lease executed in his favor by the 1st defendant, the proprietor of the trees, on the 16th February 1866, under the terms of which lease the 2nd defendant was to enjoy the trees for a period of five years, from Fusly 1276 to 1280.

The 1st defendant denied having executed the lease in favor of the 2nd defendant, and pleaded that he had created a right to the 3rd and 4th defendants.

The 2nd defendant supported the plaintiff's title, claiming to have obtained a lease of the trees for a period of five years, from the 1st defendant; that for three years of this period he had himself enjoyed the trees, and for the remaining two years had leased them to the plaintiffs.

The 3rd and 4th defendants admitting that the 2nd defendant had obtained an agreement from the 1st defendant, under which the latter was to hold the trees, affirmed that the 2nd defendant had subsequently broken his contract with the 1st defendant, and that the latter had consequently executed a lease deed in favor of these defendants and put them in possession of the trees.

(a) Present :— Holloway, Acting C. J. and Kindersley, J.

1871. February 7. R. A. No. 75 of 1870.

At the settlement of issues, the Civil Judge held that the document purporting to have been executed by the 1st defendant to the 2nd defendant was of a nature requiring registration, under the terms of Section 13, Act XVI of 1864, and that it did not come within the provision of that Section, and that the document not having been registered was inadmissible in evidence. That the 1st defendant having denied the document, the 2nd defendant's title was defective unless the document could be admitted and proved. That the plaintiff's case being dependent upon the 2nd defendant's title, fell with it, and the suit must be dismissed.

The plaintiffs preferred a regular appeal to the High Court on the ground

That the decree of the Civil Judge was wrong in law in holding that the suit was not sustainable for want of registration of the document sued on.

Mayne, for the appellants, the plaintiffs.

Miller, for the 1st respondent, the 1st defendant.

O'Sullivan, for *Gould*, for the 3rd respondent, the 3rd defendant.

The Court delivered the following judgments.

HOLLOWAY, Acting C. J.—The question is, whether 2nd defendant's document has been rightly rejected because unregistered, and the solution of this question depends upon whether it purports to create or transfer an interest in immoveable property, within the meaning of Section 13 of the Registration Act of 1864.

The document recites a lease of palm and date-trees for five years, for 2,000 Rupees per annum, for the enjoyment of the lessee by drawing toddy from them, the Government tax to be paid by the lessee, and in acknowledgment of the receipt the lessor says "I have received the full amount "of the lease of the said date-trees."

There is clearly here a transferring of the right of use of growing trees for a period of five years, and the creation of that right of use for that period. Is this an interest in immoveable property ?

Moveability may be defined to be a capacity in a thing of suffering alteration of the relation of place. Immoveability incapacity for such alteration. If, however, a thing cannot change its place without injury to the quality by virtue of which it is, what it is, it is immoveable. 1871. February 7. R. A. No. 75 of 1870.

Certain things, such as a piece of land, are in all circumstances immoveable. Others, such as trees attached to the ground, are, so long as they are so attached, immoveable: when the severance has been effected they become moveable. A document, therefore, evidencing an interest in land, must always require registration. One with respect to trees may or may not require it, according to the character of the transaction. If the parties contemplate the interest passing after the conversion of the immoveable to a moveable, it will not; if the interest passed contemplates the continuance of the quality of immoveability, it will. The present document passes not only a right of user for five years in trees rooted in the soil, but a right of user which demands for its exercise that they shall continue as growing trees. I can entertain no doubt that it both creates and transfers an interest in immoveables. If it had passed a five years' right of taking all palms of a certain age for planks, I should have thought otherwise, because it would then be manifest that the thing to pass was a moveable. According as a transaction contemplates them as in a state of attachment to, or of detachment from, the soil, the interest passed will be moveable or immoveable.

I am equally clear that the transaction is not within the exception as creating the relation of landlord and tenant. It would be quite open to the lessor to pass the land to another, or to keep it in his own hands, as he appears to have done. There is no interest in land, but in certain immoveables which are so as an accessory to the land. I am of opinion that the appeal must be dismissed with costs.

Note, Unger I. 381.

KINDERSLEY, J.—I am of the same opinion. It is impossible to maintain, in this case, that the trees were not treated by the parties as immoveable property. This differs from the case of trees sold with a view to their being cut down

1871. February 7. R. A. No. 75 of 1870.

as timber; for, in this case it was necessary for the enjoyment of the lease that the trees should remain rooted in the ground for the long period of five years. There is, perhaps, more difficulty in distinguishing this case from those in which a particular crop of fruit, such as apples or mangoes, not yet matured, is sold. But if the sap of the tree be not more essentially a part of the tree itself than the fruit of it, the length of time over which the lease in this case was to extend certainly conveyed an interest in the preservation of the trees. It seems clear that the lease by the 1st defendant to the 2nd defendant purported to convey an interest in the trees, and that the trees were immoveable property. I think it equally clear that the case does not come within the proviso to Section 13 of the Registration Act, 1864, since it was not executed between landlord and tenant relative to land. It is quite a usual arrangement in the Madras Presidency to let the land separately from the trees standing upon it. And, though it may have been necessary for the lessee to enter upon the land for the limited purpose of tapping the trees, and removing the sap, and though a license to do so may be implied in the lease, that circumstance did not make him in any sense a tenant of the land. It follows that the lease in question required registration; and, not having been registered, it was rightly rejected.

Appeal dismissed.

Appellate Jurisdiction. (a)

Regular Appeal No. 28 *of* 1870.

MRS. MARIA VARDEN SETH SAM..............*Appellant.*

APPUNDI IBRAHIM SAIB...........................*Respondent.*

Suit to recover possession of a Mutah from which plaintiff had been ejected by an order of Court, passed in execution of the decree in a suit to which he was no party. Plaintiff claimed under a deed of sale from A., (a purchaser from C. and D.) dated 11th November 1860, and alleged that he purchased for valuable consideration and, without notice of any other claim. Defendant asserted that plaintiff purchased fraudulently with notice of her late husband's right of purchase. It appeared that defendant's husband had sued C. D and others to enforce a lien upon the Mutah and obtained a judgment of the Privy Council upholding his lien and declaring its priority over the purchases of C and D. This suit was pending before the Privy Council at date of plaintiff's purchase. In 1862 defendant's husband sued C. and D. for specific performance of an alleged agreement for sale, dated October 1851, without adducing any evidence as to the existence of the agreement, and got a decree in his favor because the Principal Sadr Amin had said in the original case that C and D had agreed to sell the mutah. The present plaintiff was turned out of possession under this decree, to the proceedings in which he had in vain sought to get made a party, on the ground that he was affected by notice of the former proceedings. He sought relief under Sec. 230, Act VIII of 1859, but his application was dismissed and he then commenced this suit. The Civil Judge decided in favor of plaintiff:—*Held*, confirming the decree of the Lower Court, that this was a case of a vendee of property, perhaps subject to a lien, turned out upon a decree against other people declaring the holder of the lien the owner of the property, and that the ejectment was wrongful and procured by a gross misuse of the Court's process.

The effect of notice of a *lis pendens* considered.

Parties seeking specific performance of a contract should come to the Court for relief within a reasonable time.

1871. *January* 9. *R. A. No.* 28 *of* 1870.

THIS was a regular appeal from the decision of E. B. Foord, the Civil Judge of Chingleput, in Original Suit No. 27 of 1866.(b)

The suit was brought to recover possession of the Mutah of Tripassore, from which the plaintiff was ejected, on the 16th June 1863, by an order passed by the Civil Court of Chingleput in execution of a decree obtained by the late husband of the defendant, in Original Suit No. 11 of 1862, to which the plaintiff was not a party.

The plaintiff claimed to be entitled to the property under a deed of sale executed on the 11th November 1860 by Raghavulu Chetti, the then owner, from whom he (plaintiff) alleged that he purchased the Mutah in dispute for Rupees 4,950, and was in possession accordingly from 22nd

(a) Present :—Holloway and Kindersley, J. J.

(b) See IV. M. H. C. 297.

1871. January 9. R. A. No. 28 of 1870.

March 1861 until the 16th June 1863, when he was ejected, and that when he purchased it, he had no notice of defendant's late husband's prior right of purchase, as established in Original Suit No. 11 of 1862.

The defendant denied that the plaintiff purchased the property for valuable consideration, and asserted that he purchased it fraudulently and collusively for a fictitious consideration, and that both he and those through whom he claimed had notice of her late husband's right of purchasing the property. She further pleaded that this suit, based on the same cause of action as Original Suit No. 5 of 1864, which was dismissed by the High Court in appeal, was barred by Section 231 of the Code of Civil Procedure.

The following issues were framed.

I. Whether plaintiff was a purchaser for value *bonâ fide*, and without notice of defendant's late husband's right to purchase, and if so, whether plaintiff has an equity superior to that of the defendant.

II. Whether the suit is barred by Section 231 of the Code of Civil Procedure.

The Judgment of the Civil Judge was in part as follows:—

I shall first dispose of the question raised in the 2nd issue, and I am of opinion that the suit is not barred by Section 231 of the Code, because Original Suit No. 5 of 1864 was not disposed of on its merits, but on the technical ground that, as plaintiff sought relief under Section 230, he ought to have applied to the Court within one month from the date he was dispossessed of the property. My finding on the 2nd issue is, therefore, in the negative.

With regard to the 1st issue, I think the evidence adduced by plaintiff clearly proves that he purchased the property for valuable consideration *bonâ fide*, and that he had no notice of the late Mr. Seth Sam's right of purchase. It appears that the title-deeds of the four previous owners of the estate were delivered to him, that he was put in possession, and that he remained in possession of the property for upwards of two years, when he was ejected, in execution of the decree in a suit to which he was not a party.

I consider the evidence of the plaintiff's witnesses, on the question of notice, much stronger and more reliable than that adduced by the defendant, and even if credit be given to the statements of the defendant's 1st, 2nd, and 3rd witnesses on that point, it does not appear to me that the information said to have been given to plaintiff by Venkat Row,[a] amounted to more than mere rumour, of which plaintiff was not bound to take notice. (Sugden on Vendors, Chapter 17.)

The suit, moreover, to which these witnesses evidently refer, is reported in IX, *Moore's Indian Appeals, page* 303, and was brought by the late Mr. Seth Sam not to enforce his right to purchase the estate, but to establish a lien created by the deposit of its title-deeds.

I do not believe the statements of the defendant's 4th and 5th witnesses,[b] because I think it most unlikely that the late Mr. Seth Sam, who, it is admitted, was a practising vakil in the late Sadr Court, would have sent a verbal message on such a subject, instead of (as he would naturally have done) sending a letter and keeping a copy of it.

I think the facts of the case show that Mr. Seth Sam exhibited no intention of enforcing his right to purchase the estate until 1862, when he filed Original Suit No. 11 (of that year) in this Court, although that right had accrued to him eleven years previously.

I am, therefore, of opinion that plaintiff had neither actual nor constructive notice.

After giving the case my best consideration, and consulting the leading case (*Basset* v. *Nosworthy*, II. Eq. L. Cas. 1) and the case reported at page 14, Volume II, of the Madras High Court Reports, I am of opinion that the plaintiff in this case has, for the foregoing reasons, an equity superior to that of the defendant, and my finding on the 1st issue must be, therefore, in the affirmative.

(a) "That Mr. Sam's appeal to Europe about the estate would be decided in his favor, and that plaintiff had better not purchase."

(b) These witnesses asserted that they were sent in 1860 by Mr. Sam to plaintiff, to tell him of the suit, and warn him not to purchase the estate.

1871. January 9. R. A. No. 28 of 1870.

The defendant appealed to the High Court on the grounds:

1. That the decision of the Civil Judge was contrary to law and against the weight of evidence.

2. That the Judge ought to have found that the plaintiff had notice.

3. That the plaintiff was bound by the judgment in Original Suit No. 11 of 1862.

4. That the plaintiff was barred by Section 231 of the Civil Procedure Code.

The *Advocate General* and *Mayne*, for the appellant, the defendant.

Ráma Ráu, for the respondent, the plaintiff.

The Court delivered the following judgment:—

HOLLOWAY, J.—For the correct understanding of this singular case a brief history of its stages is absolutely necessary.

It commenced with a suit instituted by Seth Sam, deceased, to enforce a lien upon the Tripassore Mutah for an excess of purchase money paid upon a Mutah sold to him, and for which he alleged that the deeds of the Tripassore Mutah had been pledged as well, as security for the delivery of the title-deeds of the other Mutah.

The judgment and decrees of the Principal Sadr Amín and Civil Judge of Chingleput upheld the lien asserted, and declared that it had priority over the purchases of Lakpathi Lálah and Ouchterlony.

The Sadr Court, on 23rd July 1859, reversed that decree on the grounds:—

I. That the purchasers had taken all reasonable precautions, looking to the registered purchaser in a country in which title-deeds often did not exist.

II. That the remedy open to the plaintiff was a suit for a specific performance of his alleged contract, and that the evidence showed no intention of creating a lien.

On the 18th June 1860 the Privy Council gave special leave to appeal, and, as against Lakpathi Roye Lálah

Bunel Lál, Sadasiva Tauker, and Ouchterlony, the judgment[a] of the Judicial Committee upheld the lien asserted, reversing the decree of the Sadr Court on the grounds that the purchasers had not shown any thing to oust the priority of the lien, and that the vendors could only sell subject to that lien.

1871. *January 9.* *R. A. No.* 28 *of* 1870.

It might have been imagined that Sam had here attained his object, and that this long controversy had come to an end, that he had his decree, and that nothing was left but to execute it.

On the 11th September 1862 a new phase opens with a plaint which may justly be termed unexampled.

On the ground of this judgment of the Principal Sadr Amín, pleaded, as is naively said, as an estoppel, Sam sued the first two defendants, Lakpathi Lálah and James Ouchterlony, for specific performance of an alleged agreement for sale, dated October 1851. Without the adduction of a particle of evidence as to the existence of this agreement, because the Principal Sadr Amín had said in the original case that the 1st and 2nd defendants had agreed to sell the Mutah, the Civil Judge decreed specific performance of that contract. This Court confirmed the judgment on the ground that the contract was admitted, and that the only grounds raised for refusing specific performance were that the plaintiff by his former course of proceedings had abandoned the right so to sue.

The Judges thought that there were indications that he did not intend at that time to insist upon the contract, but that his course of conduct had not barred him.

The present plaintiff was turned out of possession under this decree, to the proceedings in which he had in vain sought to get made a party, on the ground that he was affected by notice of the former proceedings.

Under Section 230 of the Civil Procedure Code he then sought relief, and that application was dismissed without investigation, on grounds wholly unintelligible. Many months afterwards he renewed his application and succeeded, but this Court again held that the exceptional procedure of that Section could not then be applied. He then commenced a

(a) IX, Moo. I. A. 303.

1871. January 9. R. A. No. 28 of 1870.

regular suit, which was originally dismissed as barred by the Law of Limitations, but restored by the judgment(a) of this Court on 14th April 1869; and the restored suit terminated with the decree now under appeal.

The Civil Judge has found that the sale for valuable consideration is proved; and, with reference to the objection taken in the argument, but not one of the grounds in appeal, that the purchases previously to the sale to Ouchterlony are not proved, it is manifest that the case was conducted on the footing that the sale was admitted and its effect against Sam with reference to the doctrine of notice the only point in dispute. There is no reasonable ground for saying, on the evidence, that the Civil Judge has come to an erroneous conclusion as to the sales being perfectly valid ones and not mere simulated transfers. Whether some of them were not intended to embarrass Sam in the execution of his decree, if he obtained it, is another question. Looking at the constant transfers at every stage of the former litigation, one may reasonably suspect that the motives were not of the purest, and, like many pieces of cunning, they would have proved wholly ineffective as to any rights of Sam established in a suit pending against any one of the transferors at the period of the transfer. The maxim of Canon law "ut lite pendente nihil innovetur" has found its way into all modern Codes, and the difference of effect between it and mere notice is adverted to by the Lord Chancellor in *Bellamy* v. *Sabine* (1 DeG. & J. 566). I agree with the Civil Judge that the evidence of express notice given by the defendant is not to be relied upon, but the question of real importance is of what facts would his knowledge of that litigation have given him notice? Simply that Sam was suing to realize the amount of his security upon the Tripassore Mutah. He would, further, have had notice that Sam had vaguely averred in his plaint that original defendant "had come to the determination of selling," that he would "in a short time sell." He would, further, have discovered that Sam absolutely disclaimed that the lodgment of the title-deeds was for the purpose of a sale, and that he had falsely asserted that he had never said so. It would,

(a) See IV, M. H. C. 297.

moreover, have appeared that the Principal Sadr Amin's opinion as to this agreement to sell was on a case never made by plaintiff, that the Civil Judge's decree did not touch any such ground. If, moreover, he had had an English lawyer at his elbow, he would have been told that no man could be intending to enforce a contract of sale of property, over which he was, through four Courts, asserting a mere lien. He might, further, have been told that though the Courts of Equity in England have exercised their juris diction of specific performance occasionally with very little regard to the principles on which it was originally established (See Ld. Redesdale's remarks), although they have practically converted a contract into an alienation, they have, even as between the parties to the contract themselves, compelled those seeking such relief to come within a reasonable time. [See *Eads* v. *Williams*, and the principle of the relief stated at p. 691, IV. DeG. M. & G. *Ld. Jas. Stuart* v *L. and N. W. R. Co.* 1. DeG. M. & G. 721].

Sam perfectly well knew, when he brought a suit in 1862, that the present plaintiff was the vendee in possession, and, there can be no doubt, designedly conducted it against defendants from whom all interest had passed. It is clear that the decree in that suit is not receivable for any purpose against the present plaintiff, and, as the case now stands, there can be no doubt that the plaintiff is entitled to restoration. He was turned out on a decree establishing a title which he had never had an opportunity of disputing. He is the vendee, and has a perfectly valid title unless the prior sale is established against him. It has not been established; and, if necessary, or if it could alter the case, Sam must have an opportunity of proving it. To convert an agreement to sell into an alienation, appears to me a rule of law which ought never to be introduced into this country, at all events as against third parties. If, however, it is to be introduced, it should come with the safeguards which have accompanied it in the country of its birth, and I regard these propositions as perfectly clear:—

1. That Sam would never have even attempted, under the advice of any Equity lawyer, to bring a suit for specific performance of an agreement eleven years after its date. If

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he had, even against the person with whom he had agreed, it would at once have been dismissed.

2. That having, after the agreement, sued to establish a new lien on property, which, by the Chancery doctrine to which he now appeals, had become his—he had declared by acts perfectly unmistakeable that he had abandoned his interests under that agreement.

It is plain to me, therefore, that on the ground of this agreement, no Court could make a decree against the present plaintiff declaring that Sam became the owner of the property in 1851, and, this being so, we have the simple case of a vendee of property, perhaps subject to a lien, turned out upon a decree against other people declaring the holder of the lien the owner of the property. The ejectment was simply wrongful and procured by a gross misuse of the Court's process, aided by a singular misapprehension on the part of the Court of the effect of the former proceedings, and of the matter which could alone be determined by them.

Being of opinion that the plaintiff has proved himself an owner wrongfully ejected within the period of twelve years, the decree of the Lower Court must be confirmed with costs.

The point that plaintiff was barred by the proceedings under Section 230 of the Civil Procedure Code was abandoned by the Advocate General. It is manifest that the second proceeding was not in time, and that the previous one had been dismissed on matters altogether collateral to its merits. There was, therefore, no decision at all under the section.

KINDERSLEY, J.—I concur in this judgment.

Appeal dismissed.

Appellate Jurisdiction. (a)

Referred Case No. 50 *of* 1870.

MARWADY BEEJARAJOO *against* HAYNES.

A European Soldier, doing duty as an Army Schoolmaster, not being liable to a Court of Requests, is not exempted from liability to a Cantonment Court of Small Causes.

The fact of being a Soldier is no bar to an action and is not the basis of a valid plea to the jurisdiction.

CASE referred for the opinion of the High Court by J. Macdougall, the Acting Judge of the Cantonment Court of Small Causes at Bellary, in Suit No. 284 of 1870.

1871. *January* 20. *R. C No.* 50 *of* 1870.

The suit was brought for the recovery of money due on a bond. Defendant pleaded that he was not amenable to the jurisdiction of the Court, inasmuch as he was an European Soldier on effective strength, doing duty as Army Schoolmaster, and as such was not liable to be taken out of service by any process.

The Judge was of opinion that defendant, being a non-combatant, was liable to be sued in the Cantonment Small Cause Court, and he referred the question:—

'Whether or not a Soldier, not doing duty as a Soldier, but in Civil employ as Schoolmaster, in the Army, is amenable to the jurisdiction of this Court.'

No Counsel were instructed.

The Court delivered the following

JUDGMENT:—So far as we know the fact of being a Soldier is no bar to an action and not the basis of a valid plea to the jurisdiction.

The Mutiny Acts and the practice based upon them give Soldiers certain privileges as to the enforcement of process, but none as to liability to the jurisdiction (*Lush.* 687).

The proper answer to the question referred is, that, not being liable to a Court of Requests, there is nothing to exempt the defendant in question from liability to the Cantonment Court.

He may not be liable to be taken out of Her Majesty's service in execution; this is quite another question (*In Re Reilly* Ir. C. L. R. Q. B. 250, cited *Fisher's Dig.* I. 340).

(a) Present:—Holloway, Ag. C. J. and Innes, J.

Appellate Jurisdiction. (a)

Referred Case No. 4 of 1871.

E. CHENGALRA'YA CHETTI

against

W. SUBBIAH.

The Code of Civil Procedure expressly preserves a distinction between arrest and imprisonment, and the immunity from further process is only generated by actual confinement.

1871. *February 8.* *R. C. No. 4 of* 1871.

CASE referred for the opinion of the High Court by A. R. Vírasámi Áyyar, the District Munsif of Tirupathi, in Suit No. 284 of 1866.

Plaintiff presented a Petition, No. 311 of 1870, praying for the execution of the decree in this suit by arrest of the defendant. It appeared that previously, on the 9th January 1869, the defendant was arrested in execution of the same decree and brought before the Court. He obtained 15 days' time for payment of the sum for which the arrest was made, remaining all the time a prisoner under the charge of the batta peon. On the 1st February following the plaintiff applied to the Court for the staying of the warrant of execution for a time, in consequence of a part payment made by defendant. The Court granted the application and discharged the defendant from arrest. The question submitted to the High Court was 'whether the re-arrest of the defendant, under the circumstances of this case, is legal.'

No Counsel were instructed.

The Court delivered the following

JUDGMENT :—Our answer to the question referred must be that the second arrest is perfectly legal. It was decided by this Court in Civil Mis. Regular Appeal 279 of 1870 (Calicut) that the Code expressly preserves a distinction between arrest and imprisonment, and the immunity from further process is only generated by actual confinement.

(a) Present :—Holloway, Ag. C. J. and Kindersley, J.

Appellate Jurisdiction. (*a*)

Regular Appeal No. 20 *of* 1870.

THE HONORABLE GODAY NARRAIN GAJPATHI RA'U.................... } *Appellant.*

SRI ANKITAM VENKATA NARSING RA'U GA'RU......................... } *Respondent.*

Action for malicious prosecution. The defendant had charged the plaintiff with cheating by personation in falsely pretending that his (plaintiff's) wife had been delivered of a son, and procuring a child and passing him off as the son so born. The case was dismissed by the Magistrate and the plaintiff brought the present suit. The defendant alleged reasonable and probable cause and the absence of malice. The Civil Judge awarded Rs. 50,000 damages to the plaintiff. Upon appeal it was contended that the charge was not malicious, though the facts upon which it was based were allowed to be false. *Held*, that this depended upon the question of the absence of reasonable and probable cause, and in case of the absence, upon the cogency of the inference derivable from it. The test which has received the most approbation is partly abstract and partly concrete. Was it reasonable and probable cause for any discreet man? Was it so to the maker of the charge? Upon the facts of this case, *Held*, that if defendant's conduct was mere negligence, it was 'dissoluta negligentia.' That the facts alleged in support of the charge were such as, if believed at all, could only be believed and acted upon through such negligence that the inference of malice was irresistible.

In a suit for malicious prosecution, the expense of counsel is not a proper element in the calculation of damages awardable to a successful plaintiff.

The damages were reduced to Rs. 10,000.

THIS was a regular appeal against the decision of J. G. Thompson, the Civil Judge of Vizagapatam, in Original Suit No. 19 of 1866. *1871. February 18. R. A. No. 20 of 1870.*

The suit was brought to recover Rupees 50,000 as damages for malicious prosecution.

The plaintiff married the daughter of one Jagga Ráu, a divided step-brother of the defendant; and at the time of such marriage, he executed a document, whereby he agreed that in the event of there being no issue of the marriage, his wife should adopt a son.

Jagga Ráu died on the 31st day of January 1856, leaving his widow and his daughter, the wife of the plaintiff, his sole heirs and legal representatives; and thereupon his said widow succeeded to a life-interest in his property.

The widow died on the 31st day of July 1864, and thereupon the plaintiff's wife succeeded as heir to the

(*a*) Present:—Holloway, Ag. C. J. and Innes, J.

1871. February 13. R. A. No. 20 of 1870.

property of the said Jagga Ráu, and a certificate of heirship was issued to her.

On the 4th day of February 1866, the plaintiff's wife was delivered of a son.

On the 13th day of April, the defendant charged the plaintiff with cheating by personation in falsely pretending that his wife had been pregnant and delivered of a son on the 4th February 1866, and procuring a child and passing him off as the son so born.

This charge was dismissed by the Magistrate and thereupon plaintiff brought the present suit.

The defendant answered admitting that he charged the plaintiff before the Magistrate as in the plaint alleged, in that he had procured a child born of other persons and had put it forward as the child to which he alleged his wife had given birth. But that charge was made in good faith from information defendant had received, and which defendant believed to be true, and defendant submitted that he had reasonable and probable cause—that he would be heir and entitled to succeed to the property of the said G. Jagga Ráu, come to the possession of plaintiff's wife, in case she should die without male issue of her body. The charge made against the plaintiff, therefore, in the Magistrate's Court, was preferred in good faith, and for the purpose of protecting the honor of defendant's caste and family, and his reversionary right to a large property.

The defendant further submitted that he had instituted a suit in the Civil Court for the purpose of obtaining a decree declaratory of his reversionary right to the property so come to the possession of the plaintiff's wife.

The Civil Judge decided that the charge was made falsely, maliciously, and without reasonable and probable cause; and he awarded Rupees 50,000 to plaintiff as damages.

The defendant appealed to the High Court on the grounds, amongst others—

That there was no valid judgment delivered by the Civil Court.

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That the damages were excessive.

That there was no evidence of malice, and ample evidence of reasonable and probable cause.

The *Advocate General, Miller, Scharlieb* and *Sloan,* for the appellant, the defendant.

Mayne, for the respondent, the plaintiff.

The Court delivered the following judgments :—

HOLLOWAY, ACTING C. J. :—The first objection made was that the decree is a nullity, because a written judgment and the decree were not contemporaneous. So far as we can see, this objection applies rather to the declaration suit from which there is no appeal, than to this. Here, a short judgment referring to the result of that suit, is contained in the record. Even if applicable, it is, however, an error of procedure, resulting from the practice of short hand, not affecting the merits, and such an objection therefore as we are bound to disregard.

My observations are much shortened by the prudent admission of the Advocate General, that the facts upon which the prosecution were based are altogether false. They are proved so by the judgment of a competent Court against which no appeal has been ventured. The pillows, the painful disease, the barrenness, the supposititition are all false.

The charge was false, was it also malicious? This depends upon the question of the absence of reasonable and probable cause, and, in case of the absence, upon the cogency of the inference derivable from it. *Lister* v. *Prettyman* (IV. L. R. H. L. 521) is an example of the curious state of the English law upon this matter. The test which has received the most approbation is partly abstract and partly concrete. Was it reasonable and probable cause for any discreet man? Was it so to the maker of the charge? Now the foisting of a Mussulman's bastard by an outcast into a man's family is almost incredible. The story absolutely proved false was, on its face, to the last degree improbable.

It is unnecessary to consider the evidence of Andrews and Cox because this was matter subsequent. We have

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only another instance in this case of the extreme distrust with which opinion evidence should be received. The most honest man manages to see what he thinks that he shall see, and the alleged capabilities of the child at the first examination are greater than it possessed months afterwards. The woman was young, and, unless the barrenness was true, need not despair of issue. Further, she might have adopted. It is a story proved to be false and it is to the last decree improbable.

Then with respect to the belief by the defendant—a near relative of plaintiff through the lady whose imaginary infirmities were its main basis.

He takes the advice of counsel as to the large sum of money, about £80,000, which he believes dependent upon this lady not having issue. He neither by himself nor his female relatives takes a single step to ascertain the firmness of the ground upon which he is to drag his own relative as a criminal before a Magistrate, and make the infirmities of a woman, his own near relative, the sport of nauseous curiosity. I can entertain no doubt that, if his conduct was mere negligence, it was "dissoluta negligentia." Then, as throwing light upon the question of damages and upon the motives by which he was actuated, it is impossible not to regard his subsequent conduct. He carries on a suit in which, as is usual in such cases, we have the whole "posse comitatus" of infamy, the discarded chamber-maid and her evidence as to the pillows, the servants who knew of the importation of the bastard and the sprinkling of blood to simulate delivery, the manifestly false story of ostentatious publishing of the intent to get a child into the family, the allegation of a disease which rendered pregnancy impossible, although she was actually pregnant, and had to his knowledge been so before. This he certainly did not believe himself. I can entertain no doubt that this monstrous series of fictions, if believed at all, could only be believed and acted upon through such negligence that the inference of malice is irresistible. As to the damages—if the greatness of the ethical wrong were the only element upon which they were to be calculated, and if punishment were

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the sole aim, I should not in the position of the parties consider them excessive. The wound of the slanderous tongue is often deeper and more malignant than that of the sword, but Courts of Justice cannot act upon this, truth though it be. If the Civil Judge had put his judgment upon the extent of the injury and the wealth of the defendant, I should still, perhaps, have thought the damages excessive, but I cannot allow the expenses of counsel to be a proper element in the calculation. There should, however, be exemplary damages. In its inception, in its progress, and in its details, it is as bad a case as it is possible to conceive. In view, however, of all the considerations which should, in our opinion, influence us, we have reduced the damages to Rupees 10,000.

I have not gone minutely into the whole of the evidence, because in the state of the case it seemed unnecessary; but, of course, I reserve my right, in accordance with the rules of the Judicial Committee, of doing so, should this case be carried beyond this Court. The appeal must be dismissed with costs.

INNES, J.—I concur in dismissing this appeal, with a modification as to the amount of damages. I entertain no doubt that the mass of evidence brought forward to prove the spuriousness of the child by showing overtures and other endeavours made to obtain possession of children, a feigned pregnancy and a feigned delivery, was entirely false. Neither Narsing Ráu, nor his wife, had the smallest interest in acting in the manner they were charged with doing, and it is absurd to suppose that, without the most overwhelming necessity, they would have attempted to pass off a bastard Mussulman boy as their own son. And this opinion is further confirmed, if confirmation were required, by the conduct of the case in appeal. For it was almost conceded that the evidence was false, and that the appellant's case must rest upon his means of showing that he had reasonable ground for believing the truth of the evidence.

The subsequent pregnancies and birth of children show clearly that the wife could not have been laboring under

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the absolute incapacity for conception which the evidence for this defendant endeavoured to establish, and that this evidence was not the result of mere ignorance, but was absolutely and wilfully false, is shown by the medical evidence to the miscarriages which took place at the very same period as the evidence of the witnesses is directed to. In regard to the evidence of the two Medical Officers and Mr. Carmichael as to their observations of the child at the time of the complaint before the Magistrate, the tendency of it, if accurate, is undoubtedly to show that the child must have been considerably older than its alleged age, and so to support the allegation of its spuriousness; but that those observations must have been inaccurate seems to be clearly established by the subsequent observations of Medical men as to the size and strength of the child; and as the truth of the evidence to the spuriousness of the child is no longer attempted to be insisted upon, this evidence would only be of importance in so far as it tended to show that defendant had grounds for belief in the truth of the charge. But, in fact, it has no such tendency, because observations of this kind formed no part of the basis of information upon which defendant is said to have acted. It is contrary to reason to suppose that all the evidence for defendant (appellant) to what took place prior to the birth of the child, if false, could have had any other promoter than the defendant himself, who was the only person interested in obtaining it. To come to any other conclusion would be to suppose that these false witnesses, without any particular motive except the pleasure of perjuring themselves, came forward spontaneously and independently of each other to speak to facts, which, when put together, present all the features of an elaborately planned scheme for bringing disgrace on the family of the respondent. The prosecution was, emphatically, a malicious prosecution, and the charges have been persistently maintained, but I think 50,000 Rupees an excessive amount of damages, and we have agreed on 10,000 Rupees as sufficient.

With this modification the appeal will be dismissed, and with costs.

Appellate Jurisdiction. (a)

Referred Case No. 5 of 1871.

MARTHAMMA

against

KITTU SHEREGARA.

A Court which cannot attach primarily in execution of its decree, cannot attach in anticipation of it.

CASE referred for the opinion of the High Court by R. Vassudeva Ráu, the Additional Principal Sadr Amín of Mangalore, in Suit No. 10 of 1871.

1871. *February* 15. *R. C. No.* 5 *of* 1871.

The suit was brought for the recovery of certain jewels or their value, said jewels having been borrowed by defendant and not duly returned. At the time of filing the plaint the plaintiff put in an application, under Section 81 of the Civil Procedure Code, requesting that certain land might be attached, as the defendant was about to dispose of his immoveable property. The Principal Sadr Amín doubted whether the provisions of Sections 81 to 84 of the Civil Procedure Code, in regard to attaching immoveable property, extended to Small Cause Suits under Section 47 of Act XI of 1865, and he referred the question—

'Whether a Court of Small Causes can attach immoveable property before judgment, under Section 83 of the Code of Civil Procedure.'

No counsel were instructed.

The Court delivered the following

JUDGMENT:—We are of opinion that a Court which cannot attach primarily in execution of its decree cannot attach in anticipation of it. This shows the Section of the Civil Procedure Code inapplicable in this case.

(a) Present:—Holloway, Ag. C. J. and Innes, J.

Appellate Jurisdiction. (a)

Criminal Petition No. 63 *of* 1871.

THE RA'JAH OF VENKATAGERI................*Petitioner.*

An application under Sec. 169 of the Criminal Procedure Code, praying for sanction to institute a prosecution on a charge of perjury, should, as a general rule, be first made to the Court before which the perjury is alleged to have been committed.

1871. *February* 27. *C. P. No.* 63 *of* 1871.

THIS was an application praying for sanction, under Section 169 of the Criminal Procedure Code, for the prosecution of one Hanumanta Ráu, on a charge that he had wilfully made false statements in the Civil Court of Nellore, at the hearing of Original Suit No. 8 of 1869 on the file of that Court.

The *Acting Advocate General* and *Ráma Ráu*, for the petitioner.

This application coming on for hearing, the Court delivered the following

JUDGMENT :—As a general rule an application of this nature should, in our opinion, be first made to the Court before which the perjury is alleged to have been committed, and the circumstances of the present case do not require that it should be made an exception to the rule. We shall, therefore, dismiss this application, but without prejudice to a similar application being made to the Civil Court of Nellore.

(a) Present :—Scotland, C. J. and Holloway, J.

Appellate Jurisdiction. (a)

Regular Appeal No. 88 *of* 1867.

SRI' RA'JAH YENUMULA GAVURI-DE'VAMMA GA'RU. ... ... } *Appellant (Defendant.)*

SRI' RA'JAH YENUMULA RA'MAN-DORA GA'RU. ... ... } *Respondent (Plaintiff.)*

Plaintiff, claiming title by succession both as heir by the general Hindu Law and according to family custom, sued to recover the Totapalli estate in the zillah of Rajahmundry. Defendant, the widow of the person last in the enjoyment of the estate, pleaded that the plaintiff was not of the Royal stock, but merely a dependent of the family; that he had an elder brother alive, and therefore could not sue; and that, in accordance with her husband's instructions, as contained in his Will, she was about to adopt a son. She also alleged that plaintiff should have become a party to an appeal pending before the Privy Council from the decree in Suit No. 3 of 1860, under which the defendant's husband had recovered possession of the estate from the widow of the prior possessor, Jaggapa Dora.

The Lower Court found that the plaintiff was an undivided member of the family in which the right to the estate was vested and a dáyadi of the defendant's late husband in the 12th degree through their common ancestor Bapam Dora; and decreed in plaintiff's favor.

Pending this appeal the Privy Council delivered judgment in the appeal from the decree in Suit No. 3 of 1860, to which plaintiff and defendant had become parties.

Held, in accordance with the judgment of the Privy Council, that the estate was acquired not by Jaggapa Dora, but by his father Bapam Dora, the common ancestor, through whom plaintiff traced his kinship, and was ever since enjoyed as ancestral property derived from the said Bapam Dora. That, accordingly, the question of succession raised in this suit, similarly to that in the appeal before the Privy Council, was determinable by the law regulating the devolution of indivisible ancestral property which had vested in the last possessor.

That the objection to the plaintiff's title as heir by the general law was thus reduced to the questions—whether his alleged kinship to the last possessor was proved, and, if so, whether according to the ordinary course of legal succession to such property, he, or the defendant as the widow of the last possessor, was heir to the estate. That upon the first question plaintiff had proved his kinship to the last possessor, and, upon the second, that plaintiff was heir to the estate in preference to the defendant, the widow of the last possessor.

On the question of the extent to which property of the nature of an impartible Ráj is excepted from the general law by a special rule of succession entitling the eldest of the next of kin to take solely—*Held*, that such a usage does not interfere with the general rules of succession further than to vest the possession and enjoyment of the corpus of the whole estate in a single member of the family, subject to the legal incidents attached to it as the heritage of an undivided family. The unity of the family right to the heritage is not dissevered any more than by the succession of co-parceners to partible property; but the mode of its beneficial enjoyment is different. Instead of several members of the family holding the property in common, one takes it in its entirety, and the common law rights of the others, who would be co-parceners of partible property, are reduced to rights of survivorship to the possession of the whole, dependent upon the

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same contingency as the rights of survivorship of co-parceners *inter se* to the undivided share of each ; and to a provision for maintenance in lieu of co-parcenery shares.

The Canon of the Hindu Law of Southern India, in regard to the succession of widows, is "that a wedded wife, being chaste, takes the whole estate of a man, who being separated from his co-heirs and not subsequently re-united with them, dies leaving no male issue." The limit of the "co-heirs" must be held to include undivided collateral relations, who are descendants in the male line of one who was a co-parcener with an ancestor of the last possessor. Collateral kinsmen answering the above description have interests which pass *inter se* by right of survivorship, and a widow's right as heir is excluded by the text when any of such collateral kinsmen survive her husband. The governing principle of the rule is co-parcenery survivorship, which precludes alike the right of the widow and every other member of the family, who has no right to the enjoyment of the estate before the death of the possessor.

The sound rule to lay down with respect to undivided or impartible ancestral property, is that all the members of the family who, in the way pointed out, are entitled to unity of possession and community of interest, according to the law of partition, are co-heirs, irrespectively of their degrees of agnate relationship to each other, and that, on the death of one of them leaving a widow and no near Sapindas in the male line, the family heritage both partible and impartible passes to the survivors or survivor, to the exclusion of the widow. But when her husband was the last survivor, the widow's position (as heir, relatively to his other undivided kinsmen, is similar to her position with respect to his divided or self and separately acquired property.

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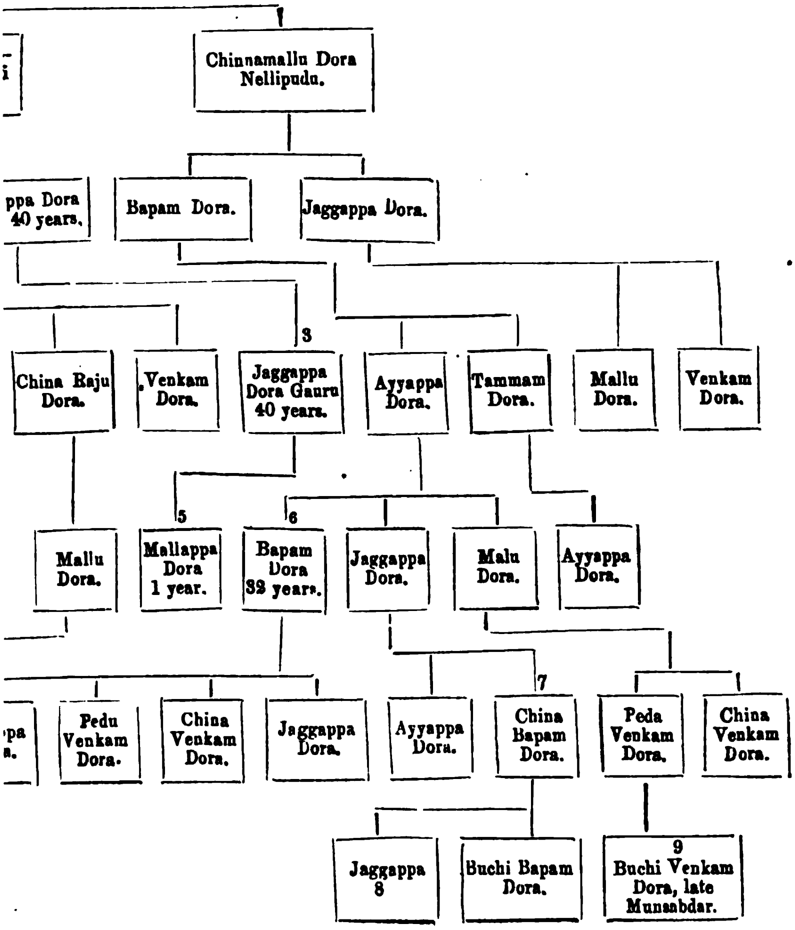
THIS was a Regular Appeal against the decision of H. Morris, the Civil Judge of Rajahmundry, in Original Suit No. 4 of 1866.

The plaintiff, as an undivided member of the family of the late owner of the Totapalli estate (Yenumula Buchi Venkan Dora Gáru) brought this suit against the widow of the said Y. Buchi Venkan Dora for possession of the said estate, as being entitled to succeed to the property both by Hindu law and by the custom of the family. The defendant asserted that the plaintiff had no right to institute the suit while an appeal was pending before the Privy Council in a case between her husband and the wife of his predecessor : that the plaintiff was not competent to sue while his elder brother and others remained in the back ground ; that the plaintiff and his brothers were dependents and not of the royal stock ; and that, in accordance with her husband's command, expressed in document No. 1, she was about to adopt the son of Yenumula Bennayya Dora, on whose behalf she held the estate.

The Totapalli estate was formerly a portion of the Zamindári of Peddapore, and was granted to an ancestor of


i
Chinnamallu Dora Nellipudu.
ppa Dora 40 years.
Bapam Dora.
Jaggappa Dora.
China Raju Dora.
Venkam Dora.
3 Jaggappa Dora Gauru 40 years.
Ayyappa Dora.
Tammam Dora.
Mallu Dora.
Venkam Dora.
Mallu Dora.
5 Mallappa Dora 1 year.
6 Bapam Dora 32 years.
Jaggappa Dora.
Malu Dora.
Ayyappa Dora.
ppa
Pedu Venkam Dora.
China Venkam Dora.
Jaggappa Dora.
Ayyappa Dora.
7 China Bapam Dora.
Peda Venkam Dora.
China Venkam Dora.
Jaggappa 8
Buchi Bapam Dora.
9 Buchi Venkam Dora, late Munsabdar.

the present family on a feudal tenure, by which the owner, or Mansabdár, was liable to be called upon for Military service. In 1859 the Military service was dispensed with on payment of an annual assessment.

In 1822, the Mansabdár then in possession furnished the Collector with an account of the family and with a statement of a family custom regarding the succession. A copy of this document was filed in the present suit (Exhibit B). A genealogical tree, a copy of which (Exhibit A) was also filed, accompanied this statement. It appeared that the estate passed in regular succession through two hands from Bavan Dora Gáru, who originally acquired it; it then descended to a distant cousin; after him it passed to a cousin in another branch, who adopted one of his nephews, the writer of the original of Exhibit B; it afterwards came to another cousin, who died in 1851 leaving two wives. The elder wife succeeded to the estate, and, after she had been in possession a few years, an action (No. 3 of 1860) was brought against her in the Civil Court, on grounds almost exactly similar to those of the present suit, by Buchi Venkan Dora Gáru, the last owner, in whose favor it was decided by the Judge, and his judgment was confirmed by the High Court in R. A. No. 15 of 1862. An appeal was preferred by the defendant to the Privy Council which was undecided at the time the present suit was brought.

It appeared that the plaintiff had an elder brother living, with whose consent this suit was brought.

The Civil Judge held that the plaintiff was the legal heir to the estate, as the fittest undivided male representative of the family; that the late Mansabdár did not authorise defendant to adopt a son, and, if he had, that the son thus adopted would not be the legal heir to the estate according to the prevailing custom and usage of the family.

The defendant appealed on the grounds—

That the plaintiff was not the legal heir to the estate, and that the assent of his brother to the suit could not make him so.

That the alleged custom was not made out, and that such a custom would be bad in law.

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That the defendant was entitled under the Will, Exhibit No. 1.

The case was first heard on the 4th March 1868, when the following issue was sent for trial by the Civil Court:—

'Whether the plaintiff and his brother, Latcham Dora, are sons of Mallu Dora, and the nearest surviving male relations of the defendant's husband Butchi Venkan Dora, and whether the relationship of the said Mallu Dora to the said Butchi Venkan Dora, the last male possessor of the property, is correctly shown in the genealogical tree marked A?'

The answer of the Civil Court was in the affirmative to both parts of the issue.

Mayne, Miller and *Kuppurámasámi Sástri* appeared for the appellant, the defendant.

The *Advocate General,* for the respondent, the plaintiff.

The Court delivered the following

JUDGMENT:—The plaintiff in this case claiming title by succession both as heir by the general Hindu Law and according to family custom, seeks to recover the property known as the Totapalli estate in the Zillah of Rajahmundry, together with mesne profits since Fusly 1276. The defendant is the widow of the person last in the enjoyment of the estate, and, soon after his death, which took place on the 20th of June 1866, she was put in possession as the rightful successor by the Collector, with the approval of the Government.

The plea of the defendant, as set forth in her written statement, is, substantially, that the plaintiff is not of the "Royal stock," that is, a member of the family in which the succession had of right passed from her husband's ancestor Bapam Dora Gáru, who originally acquired the estate, but merely a dependent of the family: that the plaintiff had an elder brother alive, and on that ground alone he could not maintain the suit; and that she was about to adopt the son of Yenumula Bennayya Dora, in accordance with her husband's instructions, and, on his behalf, was entitled to

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hold possession of the estate. It is also alleged as an objection, that the plaintiff should have become a party to the appeal then pending before the Privy Council from the decree in the Suit (No. 3 of 1860) under which the defendant's husband had recovered possession of the estate from the widow of the prior possessor, Uddanda Jaggapa Dora. To this answer there appears to have been added, at the first hearing, the plea that the plaintiff had been divided from the family of the last possessor of the estate. All these points of defence and the question of the plaintiff's heirship by custom were raised by the issues recorded in the suit;—and, thereupon, the Court below has found (1) that the plaintiff is an undivided member of the family in which the right to the estate was vested, and the second of the three sons of Mallu Dora, and so a dáyadi of the defendant's late husband in the 12th decree through their common ancestor Bapam Dora, the original acquirer of the estate, as shown in the genealogical table put in evidence by the plaintiff; (2) that by an established custom in the family, the succession to the estate, on the death of the owner leaving no male issue, could not pass to a female, but devolved on the person whom he appointed from among his near male relatives as the fittest to succeed; (3) that the defendant had not received any instructions from her husband to adopt a son, and that the alleged will put in evidence to prove such instructions (Exhibit No. 1) was a false document, but that, if she had authority to adopt, the family custom requiring the appointment of a fit person in the life-time of the owner would preclude the adopted son from succeeding.

The Court below upon these findings pronounced the plaintiff to be the legal heir to the estate as the fittest male representative of the family, considering his claim unaffected by the circumstance of his having an elder brother alive for one of two reasons (which of the two it is difficult to ascertain); either that the latter had consented to the suit, or that his seniority was no obstacle to the plaintiff being heir by selection under the family custom.

The defendant has appealed from this decision upon the grounds,—that the right of the plaintiff to succeed as the next

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heir by the general law of succession has not been established. That the finding of the Civil Court as to the family custom is without evidence to support it, but, if supported, that there had not been such a selection of the plaintiff as was necessary to constitute him heir according to the custom. That the genuineness of the document (exhibit No. 1) is proved, and, under it, whether construed to be a will or a gift, the defendant acquired a better title than the plaintiff, assuming the finding of the Civil Court as to his heirship to her husband to be right.

The appeal has been twice before the Court for distinct hearings. At the close of the arguments at the first hearing, it appeared to the Court that the case depended upon the several questions raised by the objection to the plaintiff's claim of title as heir by the general law of succession, and as that question appeared not to have been sufficiently tried, and there was no doubt that the plaintiff had an elder brother named Latsam Dora living, the Court below was required, after hearing the further evidence which the parties had to offer, to return a finding on the issue :—Whether the plaintiff and his brother Latsam were sons of Mallu Dora and the nearest surviving male relations of the defendant's late husband Butchi Venkam Dora, and whether the relationship of the said Mallu Dora to the said Butchi Venkam Dora was correctly shown in the genealogical table (exhibit A); and, further, to ascertain from Latsam Dora and certify whether he was willing to be made a party to the appeal, and to file in the record a renunciation in favor of the plaintiff of all claim to the estate.

The Lower Court returned a finding in the affirmative on both the points involved in the issue, and certified that Latsam Dora was disinclined to be made a party to the appeal, but ready to renounce all his claim in favor of the plaintiff.

On the return of this finding the case was a second time fully heard upon the point of heirship, and it then became known to the Court that the plaintiff and defendant had procured themselves to be made parties to the appeal from the decree in the Suit No. 3 of 1860, and that it was still pending before the Privy Council; and it was thought

right to defer giving judgment until the decision in the appeal had been given. The judgment of their Lordships who heard the appeal we have now before us, and it is important to see how far we must be governed by it in determining the questions in the present case.

The Suit No. 3 of 1860, like the present, was brought to eject the widow of Uddanda Jaggapa Dora, the then last possessor of the estate, by the present defendant's husband, claiming to be his nearest collateral heir. There was no dispute as to the plaintiff's relationship to the deceased. The sole question raised in the suit was whether they were members of an undivided family, and the High Court affirmed the decree of the original Court for possession of the estate to the present defendant's husband, on the ground that the status of the family was that of non-division generally. By the judgment of the Privy Council that decision is upheld, but the family status of non-division is not the only point decided. Their Lordships, dealing with the argument for the appellant, that the estate should be considered as separate property and pass by succession as such on the authority of the *Shevagunga case*; have also determined that the estate passed by grant "to the Dewan Bapam (Bavani) Dora, though, with his consent and for some undisclosed reason, it was put into the name of his third son Jaggapa Dora, and was in its inception part of the common family property, though impartible, and therefore, with certain qualifications, enjoyable by only one member of the family at the time;" and further, that what was evidenced by the document marked A in the suit, to have taken place when Bapam Dora (the grand-uncle of the present defendant's late husband) expelled his cousin Mallappa Dora from the enjoyment of the estate, had not the effect of making it a fresh separate acquisition of Bapam Dora. Their Lordships, in distinguishing the Shevagunga case, say that the document showed "no legal forfeiture, no fresh grant by any person competent to grant a legal title. It only shows that on a dispute between Mallappa and the Superior, another member of the family came in, and with the strong hand and in concert with the Superior, succeeded in ousting Mallapa and in assuming the position and rights of the

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Zamindár. That the adopted son and successor of Bapam Dora himself considered this as no substantial change in the nature or tenure of the property ; and that he still traced his title to the first Bapam (Bavani) Dora by virtue of the original grant, and spoke of the Taluq as having been enjoyed by six generations of his family during the period of 179 years."

This decision concludes one of the points upon which Mr. Mayne, for the appellant, rested his contention against the plaintiff's claim to succeed as heir by the general law. The point that the estate was self and separately acquired by Jaggappa Dora, in whose name the original grant was made ; but if not, that it afterwards became the self and separate acquisition of Bapam Dora ; and that, in either view, the plaintiff could not succeed, as, with respect to him and other members of the family claiming through an *ancestor* of the acquirer, the descent of the property worked no change in the nature of the estate. It was still self-acquisition, and their position was the same as if they had been divided members of the family, and, consequently, the rule of succession applicable to separate property applied.

Governed by the above decision, we must, in the present case, hold that the estate was acquired, not by Jaggappa Dora, but by his father Bapam (Bavani) Dora the common ancestor, through whom the plaintiff traces his kinship, and has ever since been enjoyed as ancestral property derived from the latter. From which it follows that the question of succession now raised, similarly to that in the appeal before the Privy Council, is determinable by the law which regulates the devolution of indivisible ancestral property which had vested in the last possessor. The objection to the plaintiff's title as heir by the general law is thus reduced to the questions—whether his alleged kinship to the last possessor is proved, and if so, whether according to the ordinary course of legal succession to such property, he, or the defendant as the widow of the last possessor, is heir to the estate.

First, as to the plaintiff's relationship to Buchi Venkam, the defendant's husband. It is not disputed that the genealogical table (exhibit A) which was furnished to the

Collector in 1822 by Chinna Bapam, does, as the Court below has found, correctly represent all the male descendants of Bapam Dora, the common ancestor, so far as it goes; nor is it resisted on the part of the defendant that, if the plaintiff and his brothers are the sons of Mallu Dora deceased, they are the nearest surviving male kindred of Buchi Venkam Dora. We have thus the admitted fact that the alleged father of the plaintiff was a lineal descendant of the common ancestor Bapam Dora in the 5th degree, and that Buchi Venkam Dora was one degree farther removed from him in the line of descent; and have only to consider the sufficiency of the evidence as to the alleged parentage of the plaintiff; which, we may observe in passing, it was for him and not (as the Civil Judge appears to have considered in trying the issue) for the defendant to make out.

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Three of the four witnesses examined on the part of the plaintiff give very distinct evidence as to their personal knowledge of the Mallu Dora and his brothers who are shown in the genealogical tree as the four latest descendants of the eldest son of the common ancestor, and of Mallu Dora having three sons of whom the plaintiff is the second. They give an account, too, of the brothers and state that two had issue, and mention the names of their sons and the grandsons of one of them. And two of the witnesses, who appear to be relations of the defendant's husband, depose also to their having heard older members of their family speak of the several branches of the family and of the Mallu Dora whom they knew to be the plaintiff's father, and his brothers, as the descendants of Bapam Dora's eldest son. The 4th witness is the sister of the defendant's husband, and it appears also that her sister-in-law, and afterwards her niece, married the younger brother of the plaintiff. She was thus in a position to be well informed about the relationship between her branch of the family and the plaintiff's branch; and her evidence confirms in the strongest way the testimony of the other witnesses. Looked at by itself this evidence presents to our view the appearance of truthfulness. But it has been argued for the appellant that it is rendered unreliable by the statements of the 1st defendant's husband in his counter-Peti-

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tion (exhibit No. 7), and of the 2nd and 3rd witnesses in their depositions (exhibits Nos. 8 and 9), to the effect that the 1st defendant's husband was then the only surviving male heir in the family. All three statements were made with reference to the question of title between members of one branch of the family, in the suit appealed to the Privy Council, and it may fairly be considered that their intended meaning was only that the person alluded to was the surviving heir of the particular branch. The statements do not therefore, we think, throw any discredit upon the evidence, and, together with the testimony of the plaintiff's brother and his 9th witness given at the original hearing, it makes out a sufficient case.

Then as to the evidence on the part of the defendant. We think that no safe reliance can be placed on the statements of the 1st and 2nd witnesses. They give the name of the plaintiff's father as Mallu Dora, but, making use also of the name Mulagapudi, state, with a good deal of shuffling in the 1st witness' answers, that he was not a descendant of Bapam Dora's eldest son. Neither of them, however, ventures to say to what other family he belonged, and the 2nd witness, who is connected through marriage with one of Mallu Dora's brothers, seems to admit that Mallu Dora was in some way related to the defendant's husband. It is in evidence, too, that Mallu Dora resided in the village of Mulagapudi, and so came to use that name. The 3rd witness does not profess to know much of the family, and what he states about the "Vasathi," or grant for maintenance made to the plaintiff's mother and younger brother by Chinna Bapam Dora, tends to confirm the testimony of the plaintiff's brother and his 9th witness relating to the same matter, and weighs in favor of the plaintiff's case. The other witnesses are Jaggappa Dora's widows, from whom the 1st defendant's husband recovered the estate under the decree which has been affirmed by Her Majesty in Council. Their positive testimony would have borne strongly against the evidence for the plaintiff, but for the discrediting circumstance pointed out by the Civil Judge, that, in the former suit, it was on their part pleaded and sought to be proved, that they had the obsequies of their husband performed by the

present plaintiff. It is grossly improbable that they would have put forward the plaintiff as the performer of such an important act, unless they had been well aware that he was one of the nearest surviving kinsmen of their husband, and not the menial dependent they have attempted to make him out to have been; and the plaintiff's brother, in his evidence, states that the obsequies were performed by the plaintiff. We are, therefore, satisfied by the evidence that the plaintiff is the son of Mallu Dora, the descendant of the common ancestor. Before we proceed to the other question involved in the plaintiff's claim of heirship by the general law of succession, it will be convenient to consider whether the finding of the Court below as to the family custom can be sustained. Such a custom requires the strictest proof, and we think the evidence fails to afford that proof. It may be said to rest upon the statements in the letter of Chinna Bapam Dora to the Collector in 1822 (exhibit B), for the one or two other statements to be found in the evidence are mere loose assertions of no weight, and there is, literally, nothing proved from which any safe inference favorable to the custom can be deduced from the course of succession to the estate. It seems from the same letter of Chinna Bapam, that, in both instances of the estate passing out of the strict course of descent, first to Rajam Dora and afterwards to Bapam Dora, the interruption was accomplished by forcible expulsion of the rightful possessor. And the genealogical table shows that sons have been the successors except in those instances, and on the death of Jaggappa, whom the 1st defendant's husband succeeded; and he, as undivided nephew, was a preferable heir to a female relation. No occurrence, therefore, appears evidencing that the alleged custom has ever been acted upon or recognized by the family as the rule of succession among them; and, without some satisfactory evidence of that nature, but little effect can be given to the statement in the letter (B). The writer not improbably expressed what is therein stated, upon merely a loosely formed impression of his own, and because from personal motives he wished the right of succession to be so regarded at the time. This view, too, is more than merely consistent with the other evidence:—it is rather supported by the circum-

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stance in proof that neither the writer's successor nor the defendant's husband attempted to appoint a male successor; but, on the contrary, the latter addressed the Collector in favor of a female successor to himself in the person of one of his two wives. We have not overlooked the feudal nature of the tenure by which the estate was at one time held. It is a fact which has some bearing in favor of male succession, as presenting a legal origin to which the alleged custom might be attributed. But, by itself, it is not in our opinion of any probative force. There is no doubt that several properties throughout the country, which were originally held by a similar tenure, do pass to female heirs, according to the general course of legal succession. For these reasons we are of opinion that the alleged custom has not been to any extent proved. But we fail to see how, if our conclusion had been the other way, we could have held that the plaintiff had a title as heir by selection in accordance with the custom. It would only have had the effect of excluding the widow, and so letting in his title as heir by the general law.

Then, as to the question whether the plaintiff or the defendant is the nearer heir according to the law regulating the succession to impartible ancestral property. In the case of *Naragunty Lutchmee Davammah* v. *Vengama Naidoo*, IX Moo. I. A. 66, a claim of heirship to a polliem by a collateral relation in the 4th degree of descent from the common ancestor, the deceased owner being a descendant in the 5th degree, was upheld against the widow. But there were the peculiar circumstances in the case, that the polliem had vested in the plaintiff's grandfather, and on his death passed from his minor sons to their 3rd cousins, from whom it descended to the last owner: and all that appears in the judgment on the point of collateral heirship according to the law of succession, is an allusion to the opinion of the pundits consulted as to the rule of Hindu law in favor of the plaintiff's right, and the observation that their "view was adopted by the Court below, and no objection to the decision upon this point has been urged at our Bar." This, obviously, was not meant to have the effect of a decision beyond the case, and we are not, therefore, relieved of the duty of consi-

dering the question in the present case. The first point involved is the extent to which property of this nature is excepted from the general law by a special rule of succession entitling the eldest of the next of kin to take solely. Whenever such a rule applies it has existence by force of usage and custom, as is pointed out in the judgment of this Court in *R. A. No.* 86 *of* 1868, V. M. H. C. Rep. 39, and recognized in the recent decision of the Privy Council in *Baboo Beer Pertab Sahee* v. *Rajender Pertab Sahee*, XII Moo. I. A. 18, and like every other rule of the kind it must have effect rigidly according to the established usage. Now, in the present case there is simply the admitted governing usage of succession to the possession and enjoyment of the estate as a Raj by a single heir by primogenitureship; the ordinary well recognized usage of succession to zemindaries of this Presidency; and we apprehend it to be clearly the law, that such an usage does not interfere with the general rules of succession further than to vest the possession and enjoyment of the corpus of the whole estate in a single member of the family, subject to the legal incidents attached to it as the heritage of an undivided family—that being all that the purpose of the usage, namely, the preservation of the estate as an impartible Raj, renders necessary. The unity of the family right to the heritage is not dissevered any more than by the succession of co-parceners to partible property; but the mode of its beneficial enjoyment is different. Instead of several members of the family holding the property in common, one takes it in its entirety, and the common law rights of the others, who would be co-parceners of partible property, are reduced to rights of survivorship to the possession of the whole, dependent upon the same contingency as the rights of survivorship of co-parceners *inter se* to the undivided share of each; and to a provision for maintenance in lieu of co-parcenary shares.

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This we consider to be the view of the legal effect of succession, according to the rule of primogeniture, taken in 1 *Strange's H. L.* 198 and *Vol.* II, 447: *Elb. on Inheritance* 69, 70, and upheld by the decisions of the Privy Council and of this Court on questions of succession to impartible zamindáris. In the *Shevaganga case*, where the principles of the

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rule of succession to an impartible estate were fully discussed, the judgment proceeds upon the distinction that an impartible and an undivided partible heritage are alike the family property of the members in a state of non-division; but that, in the separately acquired property of one member, the other members have no community of interest with him. And in the recent judgment of the Privy Council establishing the rights of the 1st defendant's husband to this estate, this distinction is pointed out, with the observation, that the judgment assumed that if the Zamindári had not been self and separately acquired property, the decision would have been the other way.

We have, then, to consider next the places assigned to relations in the positions of these parties, in the order of succession to partible property of an undivided family. The Canon of the Hindu Law of Southern India in regard to the succession of widows is "that a wedded wife, being chaste, "takes the whole estate of a man, who being separated from "his co-heirs and not subsequently reunited with them, "dies leaving no male issue." *Mitákshará*, Cap. II., Sec. 1, Cl. 39. This text has received judicial interpretation in the *Shevaganga case*, and the decision of the Privy Council, in that case, determines that the text does not affect a widow's right to inherit the self and separately acquired property of her husband, who leaves undivided coparceners surviving him. We are now called upon to lay down whether or not a widow is precluded by the text from inheriting joint family property held by her husband in his individual right, when there is any unseparated member of the family living. It has been put, on behalf of the respondent, that "co-heirs" includes every unseparated kinsman of the deceased, who is the descendant of the common ancestor from whom the estate descended, and so the respondent is the preferable heir. On the other hand, the contention for the appellant is, that only those of the unseparated kinsmen are co-heirs, who by birth had acquired a proprietary interest in the estate in common with the deceased:—his co-parceners who, on a division in his life-time, would have been sharers of the estate, and that such a co-parcenership can exist only between kindred who are near Sapindas, and, consequently, the respondent was not a co-heir of the deceased.

We are of opinion that this contention is right as to those only being co-heirs who became possessed of an inchoate right in the family property at their birth; but the other position, that only near Sapindas can be such co-heirs, is not, we think, tenable. The general terms, inclusive of all the members of a family, which are used in allusion to the community of interests in family property in *Macnaghten's Principles of Hindu Law, Chapter* 2, and in the judgment in the *Shevaganga case* and the other authorities to which we were referred, do certainly lend an appearance of support to the argument for the respondent. But there can be no doubt, we apprehend, that 'co-heirs' throughout the law relating to inheritance has no more extended application than it has in the law relating to partition, which *Sir Thomas Strange* lays down to be so intimately connected with the law of Inheritance that they may almost be said to be blended together; and in the law of partition, clearly, it is confined to the co-parcenery heirs, in whom the ancestral property is actually vested by birthright as a joint-estate, with rights of survivorship and (in the case of male heirs) partition. Now, certainly, none can be in such co-parceneryship, when the family heritage had not passed to co-heirs before it came to the last possessor, or when he by survivorship had become the sole owner of it, except his kindred within the limit of the near Sapindas; as a father, or brothers, and his or their descendants in the male line to the 3rd degree. *Mitákshará, Cap.* 1, *Sec.* 1, *Cl.* 27; *and Sec.* 5: *Smruti Chandrika* (*Kristnasawmy Iyer's translation*), *Cap.* 1 *and page* 104: 1 *Strange's H. L.*, 124. The principal of co-parcenery right being, as Sir Thomas Strange lays down that it is, co-ordinate with the gift of the funeral cake. 1 *Strange's H. L.* 204. They alone have on birth the inchoate estate in the property from which the co-heirship springs, and it continues until they effect a partition; or one, by the death of the others without male heirs, acquires the sole ownership.

But upon this same principle it appears to us equally certain that the limit of the co-heirs must be held to include undivided collateral relations, who are descendants in the male line of one who was a co-parcener with an ancestor of the last possessor. For, in the undivided co-parcenery in-

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terest which vested in such co-parcener, his near Sapindas were co-heirs, and when, on his death, the interest vested in his sons, or son, or other near Sapinda in the male line; the near Sapindas of such descendants or descendant became in like manner co-heirs with them or him, and so on, the co-heirship became extended through the near Sapindas down to the last descendant. Obviously, therefore, as long as the status of non-division continues, the members of the family who have, in this way, succeeded to a co-parcenery interest, are co-heirs with their kindred who possess the other undivided interests of the entire estate, and one of such kindred and his near Sapindas in the male line cannot be the only co-heirs, until by the death of all the others without descendants in the male line to the 3rd degree, he has, or he and they have, by survivorship acquired the entire right to the heritage, as effectually as if the estate had passed upon an actual partition with the co-heirs.

It follows that collateral kinsmen answering the above description have interests which pass *inter se* by right of survivorship, and that a widow's right as heir is excluded by the text under consideration when any of such collateral kinsmen survive her husband. We take the governing principle of the rule to be co-parcenery survivorship, which precludes alike the right of the widow and every other member of the family, who has no right to the enjoyment of the estate before the death of the possessor. By this view consistency with the law of Partition is preserved, as respects not only the limit of co-heirship, but also the benefits flowing from that oneness of husband and wife in the eye of the Law which is shown by the authorities to be a ground for a wife or widow being placed on the footing of a co-parcener upon a partition (*Mitákshará, Ch.* 1, *Sec.* 2: *Dáya Bhága, Ch.* 3, *Sec.* 2: *Smruti Chandrika by Kistnasawmy Iyer,* 54, 53: 1 *Strange's, H. L.*, 188): and which is declared in the text of *Brihaspati* with reference to succession; "of him whose wife is not deceased half the body survives; how should another take the property while half the body of the owner lives." Further, it seems to us that the widow's right may be deferred to distant as well as near collateral kinsmen, in whom rights of survivorship, and partition of the

partible portion of the family property were vested, jointly with her husband; without infringing on the fundamental principle of the Law of Succession; namely, the capacity to confer spiritual benefits by the offer of funeral oblations, which it seems agreed that a widow possesses only in a less degree than sons. [*Mitákshará, Ch.* 2, *Sec.* 1 : 1 *Strange's H. L.*, 135 : *Dáya Bhága, Ch.* 11, *Sec.* 1, *Clause* 43.] 1870. October 21. R. A. No. 88 of 1867.

We are of opinion, therefore, that the sound rule to lay down with respect to undivided or impartible ancestral property is, that all the members of the family who, in the way we have pointed out, are entitled to unity of possession and community of interest according to the Law of Partition, are co-heirs, irrespectively of their degrees of agnate relationship to each other, and that, on the death of one of them leaving a widow and no near Sapindas in the male line, the family heritage, both partible and impartible, passes to the survivors or survivor to the exclusion of the widow. But when her husband was the last survivor, the widow's position as heir relatively to his other undivided kinsmen, is similar to her position with respect to his divided or self and separately acquired property.

Taking this to be a correct exposition of the law, the question we are now considering is made entirely dependent upon the conclusion to be come to as to how the estate passed originally from Bapam Dora. The very scanty evidence upon this point consists of the report of Chinna Bapam in 1822 and the admission of the genealogical table; and were it not for the decision of the Privy Council already quoted, we should have felt a difficulty in saying that the proper conclusion was not that Jaggappa was, by the desire of his father, made the original grantee of the estate in his own right, but that decision settles that the estate belonged to Bapam Dora, although the grant was taken in his 3rd son's name, and passed as ancestral property derived from him.

Taking, therefore, the right to the estate to have passed to Jaggappa as his Raj by inheritance on the death of Bapam, that descent may have been because his two elder brothers had predeceased their father, or that they or the survivor of

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them had assented to his succeeding as the next heir. Now in the report of Chinna Bapam upon which the Privy Council decision is based, the brothers are represented to have been alive, and "Vasatis" made to them by Jaggappa, and that statement finds support in the strong probability that the brothers would assent to his succession, because of their father's having procured the original grant in his name. In the admitted genealogical table, too, the brothers are severally described by the names of the villages mentioned in the report as the "Vasati" of each. We think our conclusion may safely be that the brothers survived their father and acquiesced in Jaggapa's holding the estate, and if so, they were co-heirs by inheritance just as they would have been had the estate been partible, and Jaggappa by arrangement left in sole possession and management of it; and their co-parcenery interest passed to their near Sapindas and through them to their more remote lineal male descendants. But had we come to the other conclusion that Jaggappa was the eldest brother surviving at his father's death; the result must, we think, have been the same as to the right of co-heirship in this case (even if we assume that sons acquire no inchoate interest by birth in their father's separately acquired immoveable property, a point yet undetermined. See *Baboo Beer Pertab Sahee* v. *Rajender Pertab Sahee*, XII Moo. I. A. 39) for there is no doubt, we apprehend, that, on Bavani's death, the sons of the deceased brothers would have taken *per stirpes* the same co-parcenery interests in such property by inheritance as in other ancestral property, and transmitted them to their male descendants. 1 *Strange, H. L.* 125, 207; *2nd Vol.* 253.

It follows that the plaintiff, as one of the sons of Mallu Dora, was, in our judgment, a co-heir of the last possessor of the estate, and is entitled to it by the general law of succession, preferably to his widow the 1st defendant.

The plaintiff's title as heir (subject to the priority of his eldest brother's right) being established, it becomes necessary to dispose of the claim set up by the defendant under the document, exhibit No. 1, and the conclusion we have come to is that the authenticity of the

document has not been proved. The evidence of the witnesses who speak to being present at its execution by the defendant's husband, presents to our minds, in itself, very much the appearance of a concocted story, and contradicted as it is by the plaintiff's 7th and 8th witnesses, it would have been hardly possible to rely upon it if there had been no other evidence relating to this part of the case. But there is additional documentary evidence, the effect of which is, it appears to us, to discredit entirely both this evidence and the testimony of the Subordinate Magistrate (who was examined as the witness of both parties), as to his having seen the document in question in the life-time of the defendant's husband. There is, first, the suspicious circumstance that this document, which purports to give over the sole management of the estate to the senior wife, is dated the 30th May 1866, only a day later than the deceased's petition to the Collector (exhibit C) intimating that he had entrusted the sole management to his junior wife. But the most discrediting improbabilities arise from the Sub-Magistrate's Report to the Collector (exhibit D). It communicates the result of the Magistrate's inquiries of the deceased on the day before his death as to the conflicting representations about the management of the estate contained in his petitions (exhibit C. and exhibit E.) the earlier one in favour of his senior wife: and although dated the 20th June, 11 days after the document in question, it contains no allusion to it. It appears to us incredible that if the document had existence at the time, and had been both seen by the Magistrate, as he states it had, and brought formally to his notice by the receipt of the arzee addressed to him (exhibit No. 6), mention would not have been made to the Collector of it and the latter document, and specially of the authority to adopt. Further, the statement in the report as to the deceased's wish to leave the authorities to decide between the claims of his wives, is quite irreconcileable with the deceased's having, to the knowledge of the Magistrate, made such a disposition of the estate in favor of his senior wife as is set forth in the document in question, and given her authority to adopt. We believe that neither that document nor the arzi (exhibit No. 6) were in existence when the Magistrate's Report

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was made. The defendant's claim, therefore, has no foundation. But we may add that had the document been proved, it would not, we think, have availed to give the defendant a title.

The result of our judgment is, that the plaintiff, as one of the nearest co-heirs of the defendant's husband, is, upon the renunciation of his eldest brother's right, entitled to the possession of the estate. We think the parties should bear their own costs.

Appellate Jurisdiction (a.)

Special Appeal No. 392 *of* 1870.

(*Civil Miscellaneous Petition No.* 38 *of* 1871.)

AKILANDAMMAL and another.........*Special Appellants.*

S. VENKATA'CHALA MUDALI... ... ...*Special Respondent.*

Plaintiff and defendants, occupants of neighbouring houses, were joint tenants of the party-wall. Defendants unroofed their house, raised the wall and placed beams on it to rebuild their house. The Lower Appellate Court found, that, in consequence of this alteration, the rain from the defendants' house descended upon plaintiff's verandah and caused damage to plaintiff, and decreed that defendants should restore the wall to its former height, and remove the beams placed on it. *Held,* on special appeal, that taking the finding to be that the alteration created "stillicidium" where it did not exist before, or that it rendered more burdensome an existent "servitus stillicidii," it would be very dangerous to hold that every trifling excess in the exercise of a servitude should justify the pulling down of the building creating the excess: that in the present case the damages should be assessed and awarded, and the injunction to remove the roof of the house and reduce the wall be made conditional upon the defendant not removing the cause of the nuisance. In such a case the measure of damages is the amount which will induce the defendant to abate the nuisance.

1871. February 8. S. A. No. 392 of 1870.

THIS was a Special Appeal against the decision of C. G. Plumer, the Acting Civil Judge of Chittoor, in Regular Appeal No. 117 of 1868, reversing the decree of the Court of the District Munsif of Sholinghur in Original Suit No. 153 of 1867.

The suit was for trespass committed by defendants on plaintiff's wall.

Plaintiff and defendants were occupants of neighbouring houses. These houses were separated by a wall 1 foot thick

(a) Present:—Holloway, Ag. C. J., and Kindersley, J.

which lay to the south of defendants' house and north of plaintiff's house. The plaintiff stated that the former owner of defendants' house with the consent of the former owner of plaintiff's house, placed a beam upon this wall and built his own house. Plaintiff purchased his house six years before date of plaint from one Sakrapani, the original owner, and had been in enjoyment of it with the wall in question a month before date of plaint. Defendants unroofed their house, raised the height of the wall by a foot, and placed beams on it to build their own house. Plaintiff therefore, prayed that his exclusive right to the wall might be established, and defendants directed to remove that portion of the wall newly raised and the beams thereon placed.

The defendants denied the claim, and stated that the former owner of their house built a house by resting the beams thereof on the wall in question and enjoyed the house and wall. This house and wall were attached in No. 521 of 1833 for a judgment-debt, and purchased by 1st defendant's husband; that the house and the wall in question had since been in defendants' enjoyment; that the wall was their own, and that it was with the consent of 1st defendant's husband that the original owner of plaintiff's house built his verandah against the wall by letting the beams thereof into it; and that they did not raise the wall as alleged, but simply raised the beams a foot higher and repaired what was dilapidated.

The Munsif dismissed the suit.

The plaintiff appealed.

In his judgment the Civil Judge said—

After a careful consideration of the case, I have arrived at the conclusion that there was no distinct proof either by plaintiff or defendant of exclusive property in the wall; that the evidence showed common user of the wall separating the two houses, and that the plaintiff and defendants must therefore be considered as tenants in common (*Cubitt v. Porter*, 8 B & C. 257); that, as plaintiff alleged in the plaint that defendants had altered the height of the wall to his injury, he has a perfect right of action (*Stedman v. Smith*, 8 E. & B. I); but that, for the proper determination of

1871. February 8. S. A. No 392 of 1870.

this suit, it was necessary that the following issue should be determined, viz :—

Whether the defendants by raising the wall have substantially changed the nature of the property and have thereby caused damage and loss to the plaintiff.

For that purpose the suit was remanded to the Lower Court with directions to try the above issue, and to return its finding thereon, together with the evidence, within 6 weeks from date of receipt of these proceedings, under Section 354 of the Code of Civil Procedure.

The return made by the Lower Court to the above proceedings was, in effect, that the raising of the wall in question by defendants caused injury to the plaintiff's house. A memorandum of objections against the finding of the Lower Court was put in by defendant, and on the appeal coming on for re-hearing the same vakils as before were heard for the respective parties.

The gist of the defendant's objections is that the nature of the wall has not been substantially altered, in consequence of its having been raised, and that the evidence shows that no injury had been caused to plaintiff's house by the raising of the wall.

I agree with the Lower Court. I think the evidence clearly shows that a very substantial alteration has been made in the wall, of which the plaintiff and defendants are tenants in common, without the consent of the plaintiff to the alteration; that, in consequence of the alteration, the rain from defendant's house descends upon the beams, &c., of plaintiff's verandah, and that thus these beams are damaged and loss is occasioned to the plaintiff. It is admitted by the defendant that the wall has been raised by him, and I think that the evidence adduced by plaintiff clearly shows that he (plaintiff) has sustained consequent injury.

I therefore adjudge and decree that the defendants do restore the wall to the height at which it stood before it was lately raised, and that he do remove the four beams which he has placed thereon as mentioned in the plaint, and I further adjudge that defendants do pay the proportionate costs of plaintiff both in the Lower Court and on appeal.

The defendants preferred a special appeal on the ground— 1871. February 8. S. A. No. 392 of 1870.

That the facts found by the Civil Judge did not constitute any legal injury nor warrant the decree given by him.

Mayne, for the special appellants, the defendants.

The *Advocate General* and *Craig*, for the special respondent, the plaintiff.

The following judgment was delivered by

HOLLOWAY, ACTING C. J.:—In this case the suit was originally brought alleging that the wall in question belonged to the plaintiff, and that the alteration of it by the defendant was therefore wrongful. The final decision was that the plaintiff and defendant were joint tenants of the wall, but on the ground that through the alteration rain water has been thrown upon the plaintiff's verandah, so as to damage the bamboos, and that such damage is therefore an injury, the removal of the addition to the house was ordered. *Stedman* v. *Smith* (8 E. & B. 1) was a case of ouster, and has no bearing upon the relief finally given in this case.

There is a finding that the change in the character of the wall has produced damage. *Penruddock's Case*(a), referred to in the argument, was a case of eaves over-hanging a neighbour's house, but I do not understand this to be found in the present case. After some hesitation, I have come to the conclusion that we must take the finding to be that the alteration has created "stillicidium," where it did not exist before, or has rendered more burdensome an existent "servitus stillicidii." Roman law remedied this injury by the "actio aquae pluviae arcendae," and it is also held to be an injury by English law (*Battishill* v. *Reed*, 18 C. B. 696, in which all the cases are referred to). This case is important as showing the measure of damages, and the extent of the common law remedy in such cases. The test is what amount of damages will induce the defendant to abate the nuisance. The extent of the possible remedy at common law is re-

(a) 5 Rep. 101a.

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peated actions on the case, the old suits based upon the Roman law having disappeared.

That disappearance is not to be lamented. The Roman character was one of disciplined egotism, and the stern logic of the law knew of no principle upon which a man should abandon any portion of his abstract rights on account of other men. The indiscriminate adoption of Roman doctrines is not the road to the improvement of the science of law, although the only one which the most advanced advocates of improvement in England seem to have devised. It is well that the evil of the present state of things is beginning to be recognized, lamentable that the real remedy should be so little understood. Those who know that law best and can appreciate its marvellous qualities have also best guaged its defects (Ihering. Geist. des R. Rechts. I. 312—40 and §. I.). A rule is not necessarily a fit rule for adoption, because it is one of Roman law. In this particular case a better one is derivable from the decisions of some of our own Courts. That scarcely any case occurs which does not contradict or explain some other, arises from the English being a law of propositions and not of principles.

The remedy here given could only have been obtained in equity by injunction, and a very eminent judge has very recently laid down the principles on which it should be granted. (1) Material injury to a clear legal right. (2) Damages not a sufficient compensation. (*Straight* v. *Burn*, V. L. R. Ch. Ap. 163.) Now it seems to me impossible to say that either of these propositions is found to be true, and certainly not the latter of them. It would be a very dangerous extension of the principle on which such relief ought to be given to hold that every trifling excess in the exercise of a servitude should justify the pulling down of the building creating the excess. I am of opinion that, in the present case, the damages should be assessed and awarded, and the injunction to remove the roof of the house and reduce the wall, be made conditional upon the defendant not removing the cause of the nuisance to the satisfaction of the Court within two months. It is quite possible that a gutter will effect all that is needed, but the plaintiff will

certainly have every protection which the Court should grant if the injunction is granted on these terms, and compensation given for the damage which has already accrued. The defendant, too, must be careful not to trifle with the order of the Court. The defendant should pay the costs.

1871. February 8. S. A. No. 392 of 1870.

KINDERSLEY, J :—I concur in the decision of the Acting Chief Justice upon the case before us.

Appellate Jurisdiction. (a)

Special Appeal No. 249 of 1870.

SHUNGUNY MENON and another......*Special Appellants.*

KALAMPULLY VALIA NAIR............*Special Respondent.*

Suit brought by plaintiff against the first three defendants as his tenants on kanom, and the 4th, the representative of a rival jenmi, to obtain a declaration of title as jenmi. Plaintiff had previously sued the first three defendants to establish the relation of jenmi and kanomkar and to recover the land. He failed and then brought the present suit.

Held, that this was a case of the employment of the device of a suit for a declaration of title in order to get back land by a crooked and not legal process after failure to recover by proper legal means. The intention being to cut off the defendants (the tenants) from the plea of res judicata.

The Court which had a discretion as to whether such a suit should be permitted, ought at once to have said that it should not.

Where there are no interests to be protected, there is no foundation for a suit for a declaratory decree.

1871. February 14. S. A. No. 249 of 1870.

THIS was a Special Appeal against the decision of C. R. Pelly, the Civil Judge of Calicut, in Regular Appeal No. 69 of 1869, reversing the Decree of the Court of the Principal Sadr Amín of Calicut in Original Suit No. 1 of 1868.

Plaintiff sued to establish his jenm right over certain property. 1st and 2nd defendants allowed the suit to proceed *ex-parte*.

The 3rd defendant pleaded that the land was the jenm of the Cochin Pundáram. The 4th defendant, the Dewan of the Pundáram, represented his circar to be the jenmi, and pleaded that plaintiff was estopped, having already unsuccessfully sued 1st to 3rd defendants on an alleged kanom said to have been granted by his predecessor.

Original Suit No. 134 of 1865 (exhibit A) was instituted in the Temelprom Munsif's Court by present plaintiff, against defendants 1 to 3, for recovery of a portion of the lands now in dispute with arrears of net rent, on the

(a) Present :—Holloway, Ag. C. J. and Innes, J.

1871. February 14. S. A. No. 249 of 1870.

ground that plaintiff's predecessor had assigned the lands in 1027 (1851-52) on kanom to 1st defendant and one Kali (deceased) under a kaichit, whereby they (1st defendant and Kali) engaged to pay a certain annual rent, and that 2nd and 3rd defendants held under 1st defendant. 1st and 3rd defendants denied plaintiff's right and the assignment sued on, and contended that they held on kanom obtained from the Cochin Pundáram, whom they represented to be the proprietor. 2nd defendant admitted the plaintiff's claim. The District Munsif dismissed the suit—this decree was confirmed by the then Civil Judge, in Appeal Suit 654 of 1866 (exhibit B), and plaintiff thereupon instituted the present action to establish his jenm title to the whole land.

The Principal Sadr Amín dismissed the suit.

On appeal the Civil Court decreed for the plaintiff.

The 4th and 5th defendants appealed to the High Court on the following grounds:—

No declaratory decree ought to have been given, the defendants being in possession and claiming to hold adversely to the plaintiffs.

The plaintiff had already sued to establish his claim as kanomkar, and that claim had been decided against in Original Suit No. 134 of 1865.

The result of this decision is that the defendants had been holding adversely to the plaintiff since a period the date of which is not shown: and as a suit for possession would have been barred by lapse of time, no declaration of right ought to have been made.

Mayne for the special appellants, the 4th and 5th defendants.

O'Sullivan for the special respondent, the plaintiff.

The Court delivered the following judgments—

HOLLOWAY, Acting C. J.:—This is a suit brought by plaintiff against the first three persons whom he alleges to be his tenants on kanom, and the 4th, the representative of a rival jenmi, to obtain a declaration of title as jenmi.

The Principal Sadr Amín considered his title not established, and the Civil Judge holding the contrary made the declaration asked.

The plaintiff had previously sued the first three defendants, in Suit No. 134 of 1865, to establish the relation of jenmi and kanomkar and to recover the land. He failed, and the suit dismissing his claim was upheld in appeal.

The device of suits for declaration is usually resorted to for the purpose of cutting off an opponent from legal defences which would bar the claimant if the suit were brought for the relief actually wanted. This is a case of the employment of the device to get back land by some subsequent crooked and not legal process after failure to recover by proper legal means. The defence from which the tenants are to be cut off in the present case is the plea of *res judicata*, for it would, of course, be impossible to employ any such plea, unless, as rarely happens, an action based solely upon the right of property (*vindicatio*) has been brought against the now opposing claimant and failed.

Among all the contradictory decisions to which the section importing this mischievous device has led, I am not aware that any Court has supposed that it is to be tried for the stirring up, in the shape of purely historical and speculative questions, matters which have been already, for the purposes of practical life, determined by the Courts of Justice. In the former suit the title of the opposing jenmi was set up by the tenants. They were successful in establishing their denial that they held under the plaintiff, and the present suit has succeeded upon the same ground of fact as the last failed. Without seeking to add to the mischief already created by enunciating general propositions, I can entertain no doubt that the Court which had a discretion as to whether such a suit should be permitted ought at once to have said that it should not. The case seems to me to be clear enough for this Court to say so now. This is the antithesis of the case in which this Court declared a suit not permissible by one who said that he was entitled and had all to which he was entitled. Here it is—"I have lost all means of enforcing my rights. Whether I, or he under whom those in possession claim, is really jenmi is, however, a point which I should like you to decide. Of course, no Court which knew its duty would allow such a decree to be executed, but I am

1871. February 14. S. A. No. 249 of 1870.

not at all without hope that this purely historical matter may by some device be rendered very practically useful to me."—To permit such a suit, would, indeed, be to render litigation eternal. I am of opinion that the decree of the Lower Court should be reversed and the original suit dismissed. There should, however, be no costs throughout.

INNES, J :—I hold to the opinion which I have already expressed in other cases (reported at pages 333 and 378, II M. H. C. Reps.) that where there are no interests to be protected, there is no foundation for a suit for a declaratory decree. Here what is alleged and proved is a bare right of property. The right of action for possession is barred, and the plaintiff has no interest, present or contingent, which the declaration of his bare title could fortify or conserve. In cases in which a declaratory decree might operate as a protection there are sometimes circumstances which should induce a Court to refrain in its discretion from passing such a decree, but, in a case like the present, I think there is no discretion, because in my opinion there was no ground for coming to the Court at all, and the suit should not have been entertained. I concur in reversing the decree passed in appeal.

Appeal allowed.

Appellate Jurisdiction. (a)

Criminal Regular Appeal No. 358 of 1870.

SHRIRAM VENKATASA'MI.........*Appellant* (1*st Prisoner.*)

In the trial of prisoners for the offence of belonging to a gang of persons associated for the purpose of habitually committing theft or robbery (Sec. 401, Penal Code), the Judge should, in his charge, put clearly to the jury—

1. The necessity of proof of association.

2. The need of proving that that association was for the purpose of habitual theft, and that habit is to be proved by an aggregate of acts.

1871. February 21. C. R. A. No. 358 of 1870.

THIS was an appeal against the sentence of H. Morris, the Session Judge of Rajahmundry, in Case No. 58 of the Calendar for 1870

(a) Present:—Holloway and Kindersley, J. J.

1871. February 21. C. R. A. No. 358 of 1870.

The appellant was tried with three others for the offence of belonging to a gang of persons associated together for the purpose of habitually committing thefts, under Sec. 401 of the Indian Penal Code.

The prisoners belonged to the tribe of snake charmers. It was shown at the trial that several thefts had occurred in the same neighbourhood about the same time, and various articles produced, which had been recovered by the Police, with the assistance of the prisoners, were identified as stolen. It was also sworn that 1st and 2nd prisoners had confessed, but the prisoners denied this, admitting, however, that they had pointed out the places of concealment of the property before the Court. The Session Judge directed the jury as follows:—"There seems to be no doubt that the articles now before the Court consist of stolen property. The points for you to decide are,—Whether the prisoners stole them, and whether the number of thefts which occurred about the same time in the same neighbourhood show that the prisoners form part of a gang associated for the purpose of habitually committing thefts."

No counsel were instructed.

The Court delivered the following

JUDGMENT:—In this case we are of opinion that the summing up is defective, in not having put clearly to the jury—

1. The necessity of proof of association.

2. The need of proving that that association was for the purpose of habitual theft, and that habit is to be proved by an aggregate of acts.

On reading the evidence, however, we cannot say that the prisoners have been so prejudiced by that want of clearness as to justify us in ordering a new trial. We, therefore, dismiss this petition.

Appeal dismissed.

Appellate Jurisdiction. (a)

Regular Appeal No. 93 *of* 1870.

G. LEE MORRIS, ESQUIRE, receiver of the estate of the late Rájah of Tanjore. } *Appellant.*

SAMBAMU'RTHI RA'YAR, and another......... *Respondents.*

Suit brought by plaintiff, as receiver of the Tanjore Rájah's property, in April 1869, for rent for Faslis 1272, 73, 74 and 75. At the first hearing it was objected that the suit was barred, as to the claim for Faslis 1272-74, by Sec. 1, Clause 8 of the Limitation Act. Against this it was urged that a suit had been pending for upwards of 2 years, and that time ought to be allowed under Section 14. The suit in question was brought in May 1866 by one Surfogi, who had assumed the management of the property, for the same cause of action against the present 1st defendant, and dismissed in November 1868, because the plaintiff had failed to produce any evidence. Before November 1868, the title assumed by Surfogi was set aside by the High Court, the present plaintiff was appointed and applied to the Court to make him a supplemental plaintiff, but his application was rejected. *Held*, [affirming the judgment of the Civil Judge that the claim was barred] that it was quite open to the present plaintiff at his election either to affirm or disaffirm Surfogi's contract, and that, having elected to affirm it, he should have been admitted into the former suit, but that in the present action he is in this dilemma,—Coming in as successor to Surfogi and suing upon the obligation created by his contract, the plaintiff is barred by *res judicata*. Coming in paramount to him, and upon a discordant title, Surfogi's proceedings were no interruption of the period of limitation, because then Surfogi is not the person through whom he claims.

As to Fasli 1275, it was objected that pattahs and muchalkas were not exchanged as required by Act VIII of 1865, which came into force on 1st January 1866. *Held*, reversing the decision of the Civil Judge, that Act VIII of 1865 was inapplicable to the case.

The general principle is that rights already acquired shall not be affected by the retro-action of a new law. Rules as to Procedure are an exception, but the question here was not one of processual but of material law.

1871. *February* 28. *R. A. No.* 93 *of* 1870.

THIS was a Regular Appeal against the decision of P. P. Hutchins, the Acting Civil Judge of Tanjore, in Original Suit No. 4 of 1869.

The suit was brought in April 1869 by the plaintiff, as receiver of the Tanjore Rájah's property, to recover arrears of rent due for Faslis 1272, 73, 74 and 75, under a lease. The facts are sufficiently set forth in the following extract from the judgment of the Civil Judge:—

"On this case coming on for hearing, the vakil for the 1st defendant submitted that there were two preliminary objections fatal to the suit. I allowed them to be argued before going into the evidence, and as I am of opinion that the ob-

(a) Present;—Holloway and Kindersley, J. J.

jections are well founded, and it is conceded that if so, they bar the suit, I proceed at once to give judgment.

The first objection is that the claim for rent for Faslis 1272-74 is barred by the Law of Limitation, the suit not having been instituted till April 1869. Against this it was urged that a suit had been pending for upwards of two years, and that time must be allowed under Section 14.

The suit for which an allowance is claimed was brought by the 2nd defendant, for the same cause of action, against the same party, the 1st defendant. It was brought in May 1866, and dismissed under Section 148 on 5th November 1868, because the plaintiff (2nd defendant) had failed to produce any evidence. Before November 1868, the title assumed by the 2nd defendant had been set aside by the High Court, and the present plaintiff had been appointed to manage the palace property. Before the decree he applied to the Court, under Section 73, to make him a supplemental plaintiff—his application was rejected, and thereupon the suit was dismissed. If plaintiff had a right to come in at all, it is clear that he might have appealed against the rejection of his application, and the decree (4 M. H. C. Rep. 22). He is, therefore, in this dilemma—either he is claiming under the 2nd defendant and had a right to be allowed to continue that suit, in which case his remedy was in appeal, and Section 14 cannot help him—or he does not claim under the 2nd defendant, in which case a suit brought by the 2nd defendant will not help him under Section 14. And there is yet another objection to his availing himself of this suit, namely, that it was not dismissed for any cause which would fall under Section 14. The words "other cause" must, of course mean a cause *ejusdem generis*, and the only cause anything like a defect of jurisdiction which I can see here, is to suppose that the Principal Sadr Amín *thought himself unable* to make the order asked for under Section 73. But here the same dilemma comes in—if he was wrong, the remedy was an appeal; if right, the plaintiff, if not barred by *res-judicata*, can at all events derive no advantage from the judgment.

I am, therefore, of opinion that the claim for Faslis 1272-74 is barred by limitation. That for Fasli 1272, I

1871. February 23. R. A. No. 93 of 1870.

may observe, would have been barred, even allowing the time for which the suit of 1866 was pending.

Then, as to Fasli 1275 (1865-6), the objection raised is that pattahs and muchalkas were not exchanged as required by Act VIII of 1865, which came into force on the 1st January 1866. It is conceded that the plaintiff is a land-holder of the 1st class described in Section 1, but it is said (1) that having got a muchalka he can sue; that it is only the tenant's concern to see that he has a pattah, and that, if he does not ask for one, he must be presumed to have dispensed with it; (2) that the Act contemplates the interchange of pattahs and muchalkas at the beginning of the Fasli when the Act was not in force. The first argument seems to me opposed to the plain sense of Section 7 of the Act, and, if sound, would make the provisions of that Section a dead letter—a muchalka by itself is nothing more than an agreement to pay rent, and if it alone is sufficient there would be no necessity for the elaborate distinction drawn by the Act between the two classes of land-holders, and the formalities required will work no injustice, for not only can the landlord compel his tenant to accept a pattah, but even a mere tender will enable him to sue, and as to a dispensation to raise the presumption contended for, there must be something more than the mere neglect to take out a pattah, or the Act will in this way also be a mere dead letter. The second argument at first sight seems plausible enough, but the words of the Act are express. It can hardly have escaped notice that by introducing the Act in the middle of the Fasli some difficulty would be caused, and yet there is no saving clause as to subsisting agreements for that year; and, after all, the difficulty would be very slight, for the Act was duly promulgated some months before it came into force, and in January, or at latest in February (Section 9) the few recusant tenants who did not come under the old Regulations could have been forced to receive pattahs. It is not suggested that under these rent agreements there would be any distinction in this respect between the rent for the last half of 1865 and that for the first half of 1866.

The result is that I find the claim for Fasli 1275 also to be unsustainable, and I dismiss this suit with costs.

The plaintiff appealed.

Mayne for the appellant, the plaintiff.

Sanjiva Ráu for the 1st respondent, the 1st defendant.

The following judgment was delivered by

HOLLOWAY, J.—The first question is whether the suit for instalments, otherwise barred, is saved by Section 14.

The fact is that Surfogi, whose title to the land had been set aside by the decree of this Court, had been suing upon a contract with defendant and his suit had been dismissed. If the time of the currency of that suit is deducted, the action is in time. The Small Cause Court Judge refused to admit the plaintiff in place of Surfogi, although he had manifestly taken all interest in the land as representing the persons for whom he was receiver. It seems to me that it was quite open to the present plaintiff at his election either to affirm or disaffirm Surfogi's contract, and that, having elected to confirm it, he should have been admitted into the suit. Then, however, comes the dilemma:—Coming in as successor to Surfogi and suing upon the obligation created by his contract, the plaintiff is barred by *res judicata*. Coming in paramount to him and upon a discordant title, Surfogi's proceedings were no interruption of the period of limitation, because then Surfogi is not the person under whom he claims. It is very melancholy that substantial justice should be defeated by suprasubtile procedure, and specially in Small Cause Courts, in which such mischievous devices are peculiarly mischievous. If the plaintiff had asked that a case be stated, and it had been stated, doubtless the result would have been different. As to these instalments the judgment of the Civil Judge must, therefore, be affirmed.

With respect, however, to the instalment due within the time, I am of a different opinion. I do not at present seek to solve Act VIII of 1865, for I am of opinion that it is inapplicable to the case. The relation of landlord and tenant which rendered this money due was created previ-

1871. February 23. R. A. No. 93 of 1870.

ously to its enactment, and to apply it to this relation would be to give the Act a retrospective operation. The general principle is that rights already acquired shall not be affected by the retro-action of a new law. Rules as to procedure are an exception. The law as to the acquisition of rights is that prevailing at the period of the arising of the matters of fact which generate them. Their enforcement must be according to the rules of process at the period of suit. Care must, however, be taken to distinguish between laws which are merely processual, and such as under that fictitious appearance are really material. To declare a certain right, which would be validly created by certain matters of fact, not creatable without the addition of some other, is material and not formal law. The non-distinguishing has led to very great injustice.

The doctrine in *Le Roux* v. *Brown* (12 C. B. N. S. 801), which Mr. Justice Willes has said that he was never able to understand, is erroneous through this confusion. *Ex-parte Melbourn* (L. R. VI. Ch. Ap. 64) seems another example. It seems manifest that the question here was not one of processual but of material law. Now to declare that to a certain action a certain matter of fact shall be essential is to alter the right itself upon its actionable side. The judgment of the Exchequer Chamber in *Phillips* v. *Eyre* (L. R. VI. Q. B. 30), except as treating the action as an accessory right, comes nearer than any English case of which I am aware to the true doctrine. Now to say that the right of the landlord shall not exist upon its actionable side, unless something is done which was not necessary before, is to affect an acquired right by matter subsequent, and this is not processual but material law, and no retrospective effect should be given to it. I am, of course, by no means deciding that the suit was properly dismissed if the Act did apply. I am clear that it does not. Then, if Act VIII of 1865 does not apply, assuming for the purposes of the argument that there were any regulations affecting the relation of landlord and tenant when brought in question, not before a Revenue Officer, but before a Court of Justice, it is manifest that there was none applicable to this defendant.

As to the last instalment, I am, therefore, of opinion that the judgment of the Acting Civil Judge is erroneous, and that the case must be remitted for determination upon the merits. The costs will be provided for in the final decree. Note—Bar. Int. Priv. and Strafrecht, Sections 116 and 123.

1871. *February* 23. *R. A. No.* 98 *of* 1870.

KINDERSLEY, J.—I concur in this judgment.

Appellate Jurisdiction. (a)

Civil Mis. Regular Appeal No. 280 *of* 1870.

B. VENKATARA'MANNA.................. *Appellant.*

CHAVELA ATCHIYAMMA, mother and guardian of NA'RA'YANASA'MI and another .. } *Respondents.*

Petitioner, a decree-holder, attached the defendant's property in execution. Subsequently to the attachment petitioner's Vakil presented a razináma petition to the Court on behalf of his client, praying that the attachment might be removed and execution stayed. An order was made granting the petition and allowing the decree amount to be paid by instalments. Some months afterwards, the petitioner, charging that the Vakíl had presented the former petition fraudulently and without authority, applied to have his decree executed. The Civil Judge refused to alter the former order, or to notice petitioner's allegations against his Vakíl. On appeal, the High Court directed the Judge to investigate these allegations. The Civil Judge found that the Vakíl was authorized to present the petition and that his conduct was not fraudulent. *Held*, that such a petition as that presented by the Vakíl, even if within the scope of his duty, should not be permitted to alter the terms of a final decree.

The greatest caution should be exercised by the Courts before acting upon statements out of the ordinary scope of the Vakíl's authority in the particular matter for which he was employed.

THIS was an appeal against the order of H. Morris, the Civil Judge of Rajahmundry, dated 17th August 1870, passed on Miscellaneous Petition No. 945 of 1870.

1870. *December* 19. 1871. *March* 1. *C. Mis. R. A. No.* 280 *of* 1870.

The petitioner was plaintiff in Original Suit No. 4 of 1867 on the file of the Civil Court of Rajahmundry, had got a decree against the defendant in that suit, and in execution thereof attached the defendant's property. Subsequently to the attachment razináma petitions were presented by plaintiff's pleader on behalf of plaintiff and by defendant's pleader on behalf of defendant, requesting that the attachment of the said defendant's property, which had been made in execution of the decree in Original Suit No. 4 of

(a) Present :—Holloway and Innes, J. J.

1870. December 19. C. Mis. R. A. No. 280 of 1870.

1867, might be removed and execution stayed. An order was made by the Civil Court, dated 27th November 1869, granting the prayer of the petitions and allowing the decree amount to be paid by instalments as requested. In August 1870, the plaintiff presented a petition to the Civil Court charging his Vakil with fraudulent conduct, alleging that he had had no authority to present the former petition, and praying the Court to have petitioner's decree properly executed against the defendant's property. The Civil Court made the following order:—

The present razináma does not alter the terms of the decree, and the Civil Judge has taken care to say in the order, of which review is required, that it is not to be carried into effect so far as it should do so in any way. It provides for the payment of the decree amount by instalments, and the parties can, I think, make a compromise to this effect during execution. It was at their request that execution was stayed. The Civil Judge cannot inquire into the nature of the instructions given by the petitioner to his pleader; but can only consider the petition actually presented. If petitioner has any cause of action against his pleader, he must prosecute him. Vakálatnámahs are intended to authorize pleaders to act for their clients, and not to state specifically all they are to do. The Civil Judge's former order will not be altered.

Against this order the plaintiff appealed.

The High Court considered that the Civil Judge should investigate the petitioner's allegations and referred the issues—

1. Was the razinama authorized by the plaintiff, or not?

2. Is the allegation that the conduct of the Vakíl is fraudulent, true, or not?

The Civil Judge found. (1). That the razináma petition was authorized by the plaintiff. (2). That the allegation that the conduct of the pleader was fraudulent, was untrue.

R. Báláji Ráu, for the appellant.

Miller for *Johnstone,* for the respondents.

The Court delivered the following judgments :— 1871. *March* 1.

HOLLOWAY, J.—In this case I am unable to come to the conclusion, in opposition to the judgment of the Civil Judge, that the act of the Vakil was done fraudulently. Whether it was within the scope of his authority is much more doubtful. *C. Mis. R. A. No. 280 of 1870.*

The case has some resemblance to one decided the other day in an appeal from Tellicherry.

There, after the judgment of the Lower Court, the parties agreed to divide the property and filed their agreement. The man who had gained the whole of it by the decree waited until the period for a special appeal had expired, and then sought to execute that decree, and I held that, supposing consideration required, there was ample consideration; and that, the decree not being final, the question of the validity of the transaction after *res-judicata* did not arise. It had all the qualities needed for a valid compromise, and the contrary act of plaintiff was fraudulent.

In the present case the decree has become final, and by it the right of the plaintiff to obtain his money at once was irrevocably settled. It is, clearly, an alteration of that relation to say that it shall not be received for 20 years. Section 243 might alter the case, if the order made by the Civil Judge upon the agreement of the parties was justifiable under that Section, but the case reported (V. M. H. C. 272) is a distinct decision that the Court had not power to make such an order. I come, therefore, to the dry legal question whether the transaction after *res-judicata* is valid against the decree-holder. Despite the disputes upon the matter, the true doctrine of the Roman Law unquestionably was that there was absolutely invalidity " cum de sententia indubitata quae nullo remedio adtemptari potest transigitur" (see Vang. III. p. 512, and Holzschuher III. 1048). The reason was plain. There must be something uncertain, at least subjectively, for such a transaction to be possible. Further, the compromise was treated in Roman Law as equivalent to *res-judicata*, and you could no more logically have a compromise after *res-judicata* than you could have a second suit. I considered the English Law on the matter the other day, and the only footing

1871. March 1. C. Mis. R. A. No. 280 of 1870.

upon which this transaction could there be put is that of an obligation arising out of contract. Now for this contract there was clearly no consideration whatever. I am of opinion that it is a sound principle that such a petition as this, even if presented and within the scope of the Vakíl's duty, should not be permitted to alter the terms of a final decree, for that is the extent to which the narrowing of the plaintiff's rights in execution would lead me. I feel great force in the observation made by the Vakil in the argument, that, before acting upon such a petition, the Court should have required the Vakíl to present a vakálatnámah distinctly authorizing the making of this strange agreement. The greatest caution should be exercised by the Courts before acting upon statements out of the ordinary scope of the Vakíl's authority in the particular matter for which he was employed. Had such caution been exercised, the present dispute could never have arisen. I do not think it necessary to go further into the question of the Vakíl's authority, because I am of opinion, on the principles stated, that the plaintiff ought not to be bound by it, even if made. I do not enter here upon the exceptions to this principle in Roman Law because they have plainly no bearing. I would reverse the order of the Civil Judge, upholding this compromise in opposition to the terms of a final decree, and direct that the plaintiff's application for execution according to the terms of his decree be complied with. There should be no costs.

Innes, J.—Three questions have been raised in this case. Whether the conduct of the Vakil was fraudulent, whether after final decree the Court could accept the compromise and enforce it in execution, and whether, if not enforceable in execution, it is otherwise valid. I am of opinion that the Civil Judge has rightly found that what was done by the Vakíl was done with the assent of the petitioner, the decree-holder, and that the Vakíl did not act fraudulently or without authority. After a final decree a Court is clearly incompetent to entertain a compromise between the parties which would have the effect, not of satisfying the decree, but of setting it aside, and substituting something in room of it. It follows that if such an arrangement is with the sanction of the Court placed

on its records, it is unenforceable in execution, because it is not the decree. Then as to whether such an arrangement is otherwise enforceable, *i. e.* enforceable as a valid agreement, I think it is not. The decree is still subsisting and capable of being enforced, and there is no consideration for the agreement on either side. The determination of this question, however, is not important, because it is now only sought to enforce the agreement in execution as having taken the place of the decree. I agree in reversing without costs the decree of the Civil Judge, and in the directions proposed.

1871.
March 1.
C. Mis. R. A. No. 280 *of* 1870.

Appellate Jurisdiction. (a)

Referred Case No. 10 *of* 1871.

Suit No. 18 of 1871. { GOVINDAPPAH...............*Plaintiff.* / KONDAPPAH SA'STRULU...*Defendant.*

(Decree Execution Case 50 of 1871.) { GOVINDAPPAH...............*Petitioner.* / KYATADOO...................*Defendant.*

(Decree Execution Case 49 of 1871). { MALLAPPAH ....*Petitioner.* / NAGANNA and another....*Defendants.*

A certificate under Act XXVII of 1860 is not necessary to give to a person, claiming to be the representative of a deceased creditor, the right to institute a suit to recover a debt due to the estate of the deceased, or the right to present an application for execution of a decree obtained by the deceased. But such certificate, or a probate, or letters of administration, must be produced by the person proceeding as representative before a decree or order can be passed, or process of execution issued for payment of the debt due, except the Court should think that payment is withheld from fraudulent or vexatious motives, and not from any reasonable doubt as to the party entitled.

The effect of the provision in the note to Article 12, Schedule 1, of the Court Fees' Act [No. VII of 1870] on the operation of a certificate duly granted, which has become liable to cancellation under that provision, but has not been cancelled, considered.

CASE referred for the opinion of the High Court by P. Terumala Ráu, the District Munsif of Purghee, in Suits Nos. 57 and 131 of 1866 (Decree Execution Cases 50 and 49 of 1871) and in Suit No. 18 of 1871.

1871.
March 3.
R. C. No. 10 *of* 1871.

Original Suit No. 18 of 1871 was brought against defendant on the 16th January 1871, on a bond, dated 17th January 1868, executed in favor of plaintiff's deceased father,

(a) Present :—Scotland, C. J. and Innes, J.

1871. March 3. R. C. No. 10 of 1871.

Plaintiff stated that he had applied to the District Civil Court for a certificate, under Act XXVII of 1860, that he would produce it before applying for execution of the decree, and that he brought this suit to save the Act of Limitations.

Decree Execution Case No. 50 of 1871 was an application for execution of the decree obtained by applicant's deceased father in Original Suit 57 of 1866. The applicant stated that he had applied for a certificate under Act XXVII of 1860, and that he would produce it before he received the money from the Court. He urged that process of execution might be issued at once, as the judgment-debtor was about to dispose of his property.

Decree Execution Case No. 49 of 1871 was an application for execution of the decree obtained by the applicant's deceased father in Original Suit No. 131 of 1866. The applicant stated that he had first obtained a certificate under Act XXVII of 1860 for Rupees 2,000, and had collected debts to that amount. That on his presenting a second application for a renewed certificate to enable him to recover a further sum of Rupees 1,300, it was rejected. He prayed that, notwithstanding his inability to produce a fresh certificate, process of execution might be immediately issued, as defendants were about to dispose of their property.

On these facts the District Munsif referred the following questions:—

I. Can the representative of a deceased person sue for the recovery of a debt, and obtain a decree; and can such representative of a decree-holder apply for the execution of a decree; without the production of the required certificate, under Act XXVII of 1860, but on the condition of producing it before he receives the decree amount?

II. Can the Court allow the certified representative, either to sue, or to move for the execution of a decree, on his producing a certificate granted to him, under Act XXVII of 1860, on a date more than one year before, but not renewed under Article 12, Schedule 1, Act VII of 1870?(a)

(a) Act VII of 1870, Sch. 1, Art. 12 provides that the fees on a certificate granted under Act XXVII of 1860, or under Bombay Regulation VIII of 1827 shall (if the amount or value of the property in respect of which the probate or letters or certificate shall be granted

III. Are the renewed certificates under Article 12, Schedule 1, Act VII of 1870, necessary even in suits or applications for the execution of decrees, the amount of which do not exceed 1,000 Rupees ?

1871. *March 3.* *R. C. No. 10 of* 1871.

IV. Where a representative obtained a certificate to recover a sum of Rupees 2,000, which he then stated was due to the deceased person, and applied subsequently to the District Court for another certificate for the sum of Rupees 1,300, stating that the money for which the former certificate was granted was recovered; but the District Court declined to grant another certificate on the ground that the second application was quite inconsistent with the former, which laid the debt at Rupees 2,000.—Can this representative sue for the execution of a decree obtained by a deceased person ? If not, what is his remedy ?

Miller for *Scharlieb,* for the petitioner in Decree Execution Case No. 49 of 1871.

The Court delivered the following

JUDGMENT:—In answer to the first question referred by the District Munsif, we are of opinion that a certificate under Act XXVII of 1860 is not necessary to give to a person, claiming to be the representative of a deceased creditor, the right to institute a suit to recover a debt due to the estate of the deceased, or the right to present an application for execution of a decree obtained by the deceased. But that such a certificate, or a probate, or letters of administration must be produced by the person proceeding as representative, before a decree or order can be passed, or process of execution issued for payment of the debt due, except the Court should think that payment is withheld from frau-

exceeds one thousand Rupees) be two per cent. on such amount or value.

"NOTE.—The person to whom any such certificate is granted or his representative, shall, after the expiration of twelve months from the date of such certificate and thereafter whenever the Court granting such certificate requires him so to do, file a statement on oath of all monies recovered or realized by him under such certificate.

If the monies so recovered or realised exceed the amount of debts or other property as sworn to by the person to whom the certificate is granted, the Court may cancel the same and order such person to take out a fresh certificate and pay the fee prescribed by this schedule for such excess.

In default of filing such statement within the time allowed, the Court may cancel the certificate."

1871. March 3. R. C. No. 10 of 1871.

dulent or vexatious motives, and not from any reasonable doubt as to the party entitled. This, we consider, is the right construction of Section 2 of the Act.(a)

A person claiming to be the representative of a deceased creditor can hardly be said to compel a debtor to the deceased's estate to pay his debt by simply instituting a suit or applying for execution against him. But even assuming that the prohibitive words of the section might be so read, we think that the qualifying provision which follows:— "Unless the Court shall be of opinion that the payment of "the debt is withheld from fraudulent or vexatious motives, "and not from any reasonable doubt as to the party enti- "tled," imports plainly the pendency of a suit or proceeding in which the Court is to consider and determine whether the debt is so withheld. Unavoidable delay or difficulty in obtaining a certificate is not, therefore, an obstacle to saving the remedy against the debtor to the estate of a deceased person from the operation of the Act of Limitations.

The other three questions referred depend upon one point, namely, the effect of the provision in the note to Article 12 of the first Schedule to the Court Fees' Act (No. 7 of 1870) on the operation of a certificate duly granted, which has become liable to cancellation under that provision, but has not been cancelled.

We are of opinion that the validity of such subsisting certificate, as proof of the representative right of the person to whom it was granted to enforce by a suit or process of execution payment of a debt, is unaffected by that provision. Its apparent object is not to prevent the realization of monies due by means of an existing certificate; but to secure payment of the stamp revenue on all sums so realized by a suit or other proceeding, in excess of the amount or value of the property in respect of which the certificate was granted. The power of cancellation is given only upon its appearing from the statement on oath required of the certificated

(a) Section 2 of Act XXVII of 1860 provides that "no debtor of any deceased person shall be compelled in any Court to pay his debt to any person claiming to be entitled to the effects of any deceased person or any part thereof, except on the production of a certificate to be obtained in manner hereinafter mentioned or of a probate or letters of administration, unless the Court shall be of opinion that payment of the debt is withheld from fraudulent or vexatious motives, and not from any reasonable doubt as to the party entitled."

representative, that the monies "received or realized" under certificate exceed the amount sworn to on the granting of it, and in case of default on the part of the representative by not filing such statement within the time allowed for that purpose. Until cancellation has taken place on one of those grounds the certificate remains in full force as proof of the representative right to sue or obtain execution, whatever be the amount of the debt sought to be realized. This opinion affords an answer to the three questions.

1871. *March* 3. *R. C. No.* 10 *of* 1871.

Appellate Jurisdiction. (*a*)

Referred Case No. 11 *of* 1871.

Section 89 of the Code of Civil Procedure renders an attachment before judgment ineffectual as a bar to process of execution against the property attached in satisfaction of a decree in another suit, whether obtained before or after the attachment.

1871. *March* 13. *R. C. No.* 11 *of* 1871.

CASE referred for the opinion of the High Court by Arnáchala Áyyar, the District Múnsif of Tinnevelly, in Suits Nos. 38 and 42 of 1871.

The plaintiff in Original Suit No. 42 of 1871 on the District Múnsif's side of the Court, applied for attachment before judgment of defendant's moveable property, under Section 81 of the Civil Procedure Code. The property was accordingly attached and sold, and the sale proceeds held in Court in deposit pending the final disposal of the suit. Meantime another plaintiff brought Suit No. 38 of 1871 on the Small Cause side, against the same defendant, and obtained judgment subsequently to the date of attachment before judgment in Suit No. 42. The latter plaintiff asked, under Section 237 of the Civil Procedure Code, the money in deposit on account of Suit No. 42 to be attached and paid her.

On these facts the Múnsif referred the question,—Whether the attachment after judgment in Suit No. 38, made subsequent to the date of attachment before judgment in Suit No. 42, affects the right of the latter plaintiff to have the property attached made available for his debt, in case he also obtains judgment.

No counsel were instructed.

(*a*) Present:—Scotland, C. J. and Innes, J.

1871. March 13. R. C. No. 11 of 1871.

The Court delivered the following

JUDGMENT :—We are of opinion that Section 89 of the Code of Civil Procedure renders an attachment before judgment ineffectual as a bar to process of execution against the property attached in satisfaction of a decree in another suit, whether obtained before or after the attachment. In the present case, therefore, if the property attached had remained under attachment, the decree-holder would clearly have had a right to enforce the sale of it in execution of his decree. But it has been sold by order of the Court (whether rightly or wrongly it is not necessary here to consider, but we may point out that the Ruling of the Sadr Court quoted by the District Múnsif refers to attachment in execution of decrees), and, as respects the claim of the decree-holder, the proceeds of the sale in deposit in the Court must be regarded as representing the property sold. It is, therefore, money in Court which may become payable to the defendant in the event of a decree not being obtained in the suit in which the property was attached, consequently the decree-holder's application to attach the money under Section 237 was, we think, regular, and he is at liberty after attachment to apply for an order for the payment out of the money, or any part of it, in satisfaction of the decree, under Section 242.

Appellate Jurisdiction. (a)

Special Appeal No. 417 of 1870.

MOPARTI PITCHI NAIDU..........................*Appellant.*

VUPPALA KONDAMMA..........................*Respondent.*

A Petition sent by post is not a substitute for the presentation of a plaint as required by Section 50 of Madras Act VIII of 1865.

1871. March 13. S. A. No. 417 of 1870.

THIS was a special appeal from the decision of J. R. Cockerell, the Civil Judge of Nellore, in Appeal Suit No. 20 of 1869, reversing the decree of the Assistant Collector of Nellore in Summary Suit No. 14 of 1868.

The suit was brought under Section 50 of the Rent Recovery Act (Madras Act VIII of 1865) for release of a bullock attached by plaintiff's landlord, and for damages for the injury sustained by the distraint of the animal.

The Assistant Collector gave judgment for the plaintiff.

(a) Present :—Scotland, C. J. and Innes, J.

1871. March 13. S. A. No. 417 of 1870.

The defendant appealed to the Civil Court upon the ground, amongst others, that the suit was barred by lapse of time. It appeared that the distraint was made on the 11th July 1868. Twelve days after the plaintiff addressed a petition by post to the Acting Head Assistant Collector. This officer, on receiving the petition, endorsed it, advising the plaintiff that he must lay a summary suit under Act VIII of 1865. The plaintiff filed his plaint on the 28th September.

The judgment of the Civil Judge was in part as follows :—"The plaintiff should have proceeded under Section 50 and within thirty days from the date of the distraint with reference to Section 18. The words of Section 18 are "if the tenant does not appeal against the distraint by filing a summary suit before the Collector within thirty days from the date of such distraint."

In the present case, the plaintiff filed his plaint on the 28th September, that is to say forty days after receiving his petition endorsed by the Acting Head Assistant Collector. Accordingly the suit is barred by lapse of time.

It has been urged that the requirements of Section 18 of the Act were satisfied by the address of the petition by plaintiff to the Acting Head Assistant Collector, on the 11th July 1868. The argument appears to me to be unsound. A Revenue Officer adjudicating under Act VIII of 1865 assumes the functions of a Civil Judge, and his powers are those of a Civil Court and his procedure the same.—Section 50 especially says that a plaintiff is to proceed by plaint. In the present case the communication addressed to the Acting Head Assistant Collector in the first instance was a petition. The *plaint* was not within time.

I reverse the decree of the Lower Court and dismiss plaintiff's suit with costs."

The plaintiff presented a special appeal to the High Court on the ground that the Civil Judge was wrong in holding that the plaintiff did not appeal against the distraint within thirty days from the date of the distraint, from the mere fact of his original application not having been written in the form of a plaint.

1871. March 13. S. A. No. 417 of 1870.

Ráma Ráu, for the special appellant, the plaintiff.

Rangaiya Náyudu, for the special respondent, the first defendant.

The High Court confirmed the decree of the Civil Judge upon the ground that a petition sent by post is not a substitute for the presentation of a plaint as required by Section 50 of Madras Act VIII of 1865.

The Special Appeal was, accordingly, dismissed with costs.

Appellate Jurisdiction. (a)

Special Appeal No. 179 *of* 1870.

KAMMANA KALLACHERI ILLATH VASSUDAVAN NAMBU'DIRI and 3 others............................ *Special Appellants.*

CHEMBRAKANDY MU'SSA KU'TTI and 2 others..................... *Special Respondents.*

The words "in the meantime" in Clause 15, Section 1 of the Limitation Act, import the time between the creation of the relation of mortgagor and mortgagee in possession and the end of the period of limitation.

Stansfield v. *Hobson* (3 DeG. M. & G. 620) dissented from.

1871. January 6. S. A. No. 179 of 1870.

THIS was a special appeal against the decision of K. R. Krishna Ménon, the Principal Sadr Amín of Tellicherry, in Regular Appeal No. 370 of 1868, reversing the decree of the Court of the District Munsif of Badagara, in Original Suit No. 143 of 1866.

The suit was brought to redeem land alleged to have been demised on otti mortgage in 990 (1814-15.) The District Múnsif disbelieved the mortgage sued on, but found a mortgage in 961 (1785-86) and an acknowledgment by the defendants more than 60 years after the date of the mortgage and less than 60 years before suit, and he decreed for the plaintiffs. On appeal the Principal Sadr Amín held that the words "in the meantime," in Clause 15, Section 1 of the Limitation Act, meant, in the case of immoveable property, the interval between the date of the mortgage and the day on which the period of 60 years from that date expires; and he reversed the decision of the District Múnsif.

(a) Present :—Holloway, Ag. C. J. and Innes, J.

1871. January 6. S. A. No. 179 of 1870.

The plaintiffs appealed to the High Court on the ground that there was a sufficient acknowledgment to take the case out of the Act of Limitation.

Mayne for the special appellants, the plaintiffs.

Johnstone for the special respondents, the defendants.

The Court delivered the following judgments:—

HOLLOWAY, Acting C. J.:—The question is whether the words "in the meantime" in Clause 15, Section 1 of the Limitation Act, import the time between the creation of the relation of mortgagor and mortgagee in possession and the end of the period of limitation, or that between the creation and the bringing of the action.

On the plain construction of the words it is impossible not to see that the former is the meaning, and that an acknowledgment after the lapse of the 60 or 30 years, as the case may be, will not give a new period of limitation.

Stansfield v. *Hobson* (3 DeG. M. & G. 620 : 16 Beav. 236) tacitly decided the contrary, upon Section 28 of the English Act of which ours is an imitation. Not a word is said in the judgments, either at the Rolls or by the Lords Justices, on the point raised by Mr. Palmer, and the decision, if right, would perhaps *a fortiori* be right here, because of the express words of Section 34 of the English Act.

The case is examined with great care by Mr. Brown in his recent work upon these Statutes, and both he and Messrs. Darby and Bosanquet come clearly to the opinion that it was badly decided. If the case is correctly reported and was not complicated with some question of trusts, as some language in the first report at the Rolls seems to render it not impossible that it was, I have no doubt whatever that it is a decision which ought not to be followed in this Court, although incidentally approved of in *Pendleton* v. *North* (1 DeG. F. & J. 81).

With respect to the wider principles adverted to by Mr. Mayne in his very able argument, provoked by the Court, upon the theme that it is the principle of all Statutes of Limitation to bar the right and not the remedy, I will only observe at present that the relation of the action to various

1871. January 6. S. A. No. 179 of 1870.

sorts of rights is different. With respect to a real right, and a right to a forbearance of any kind, the right is always protected by an action, but the occasion for its exercise arises only upon the infraction. With respect to a right to require a man to do something, the action and the occasion arise together, and Statutes of Limitation begin in the two cases to run from different periods. Again, an "actio in rem" lies only, in strict legal logic, against him who disputes my real right. If he acknowledges it but injures it, I have an action, but no longer a real action, although the action which I then exercise potentially existed during the whole existence of the right. It is obvious that a mere acknowledgment of a real right removes the basis of the real action. With respect to a mere personal action the question divides the great lawyers into two opposite camps. It is in effect the question whether, on the theory of Roman law, a natural obligation survives after the actionable quality has been barred. The affirmative is asserted by Savigny, Erxleben, Demelius, Böcking and Brinz. The negative by Sintenis, Thibaut in his last edition (for he changed his opinion), Wächter, Vangerow, Bekker. Having for another purpose gone through the whole of the controversy, I may venture to say that my opinion coincides with that of the latter group. It would be very instructive to trace the very hesitating and inconsistent steps by which the decisions upon the Statute of James proceeded. In Holt's time all the Judges were consulted and the ground of their decision is very singular. The early decisions in *Cro. Car.* show that they did not think that the statute required to be pleaded. They altered their opinion during the period embraced in the volume, but Croke himself adhered to it. This pleading test, pointing to the difference between extinction of a right in action by operation of law and "ope exceptionis" is very instructive upon the point. There could be nothing inconsistent, therefore, in holding the "actio in rem" revivable by an acknowledgment after the period by one who holds with me that the obligation disappears altogether with the disappearance of the action. In the present case the action which it is now sought to bring is barred because the time has elapsed within which it could be exercised;

and the only mode by which that period could be extended has not been followed. I entertain no doubt that upon the proper construction of this section the special appeal must be dismissed with costs.

1871. *January* 6. *S. A. No.* 179 *of* 1870.

INNES, J:—I agree in the view of this 15th clause of the 1st Section of the Limitation Act, taken by the Acting Chief Justice. It seems to me that if the section were intended to import that the depositor, pawner, or mortgagor might recover at a period of 30 or 60 years (according to the nature of the property) from the date of any acknowledgment in writing, whenever given, it would be necessary to hold that the words "in the meantime" are superfluous, because then the meaning of the section would be clearly expressed without them, and the same remark appears applicable to Section 28, 3rd and 4th William IV, Cap. 27, upon which this section is founded. Also, the words "in the meantime" mean "between the two points of time of the period spoken of," and should relate to some period lying between two points of time, previously referred to and placed in relation the one to the other, as embracing a particular period; and, in strict accuracy of language, the only period so spoken of is that from the date of the mortgage to the termination of the 30 or 60 years.

There is no other period expressed in the section to which the words "in the meantime" could be referred, though it is of course possible to imply one, but only by doing violence to the natural application of the words. The special appeal, therefore, must be dismissed with costs.

Appeal dismissed.

Appellate Jurisdiction. (a)

Regular Appeal No. 73 *of* 1870.

HI'RADA BA'SAPPA..................... ....*Appellant.*

GADIGI MUDDAPPA.......................*Respondent.*

The effect of Section 8 of Act XIV of 1859 is to enact that nothing in an account of mutual dealings between merchants and traders is to be barred, provided that there is one item, indicating the continuance of such dealings, proved to have occurred within the period of limitation.

1871. *February* 10. *R. A. No.* 73 *of* 1870.

THIS was a Regular Appeal against the Decree of O. B. Irvine, the Acting Civil Judge of Bellary, in Original Suit No. 11 of 1869.

The facts of this case are fully stated in the judgment of the Civil Judge, which was as follows:—

"The plaintiff sued to recover Rupees 6,914-15-6, which he claimed to be due as principal and interest on account of mutual dealings carried on between him and the defendant from 25th March 1864 to 13th January 1867. The plaint set forth that the sum claimed was found to be due upon a settlement of accounts between the parties on 25th January 1867.

The defendant denied dealings between the parties as alleged in the plaint, and pleaded that the suit was barred by Clause 9, Section 1 of the Limitation Act, the different items in the accounts showing the alleged transactions to have taken place upwards of three years before the suit was brought, with the exception of a few items which referred to transactions of which the dates were barred, but which were improperly entered in the plaintiff's accounts for the year 1867. The defendant denied that the dealings carried on between him and the plaintiff were mutual, and referred to Original Suit No. 4 of 1868, formerly instituted by the plaintiff's father against this defendant and his brothers, as relating to dealings of a similar character to the present, and which this Court and the High Court on appeal had pronounced to be not mutual dealings, and therefore not governed by Section 8 of the Limitation Act.

The plaintiff directed the Court's attention to three previous suits decided, which he pronounced to be of a similar

(a) Present:—Holloway, Ag. C. J. and Innes, J.

nature to the present claim. With reference to these suits I observe that the two first are not applicable to this suit, because decided before the present Limitation Act was in operation, and the last related to partnership dealings, and is, therefore, not of a similar nature to the present suit.

1871. *February* 10. *R. A. No.* 73 *of* 1870.

Having heard vakils for both parties and perused the accounts filed in the suit, I am clearly of opinion that the dealings herein specified are not of the nature of mutual dealings to which Section 8 of the Act is applicable.

The plaintiff's accounts show that the plaintiff made advances to the defendant, which were refunded by the latter at different times and in different sums. The plaintiff's vakil admits this, but urges that each party should be regarded as having made loans to the other, and that therefore the dealings were strictly mutual dealings, and so not barred.

I think there is nothing in this suit to indicate mutual dealings within the meaning of Section 8, Act XIV of 1859, and that, therefore, Clause 9, Section 1, must be held applicacable. The suit not having been brought till 1869, the items bearing date 1864 and 1865 are all barred, as well as those which appear at the close of the account, and dated 1867, but referring to transactions of the year 1864.

From the few items under the head of receipts and disbursements which appear in the accounts for the year 1866, the Court cannot conclude that the defendant is indebted to the plaintiff, and therefore in respect of these there is no cause of action.

For the foregoing reasons, I dismiss the suit and direct the plaintiff to bear the defendant's costs."

The plaintiff appealed on the ground that the suit was not barred by the Law of Limitations.

Mayne for the appellant, the plaintiff.

Gould for the respondent, the defendant.

The judgment of the Court was delivered by

HOLLOWAY, Acting C. J :—This is a question upon the construction of Section 8 of the Limitation Act. There are three requisites for the applicability of the exception,

1871. February 10. R. A. No. 78 of 1870.

1. The suit must be for balances of accounts current.
2. The persons must be merchants or traders.
3. They must have had mutual dealings.

Now the plaint, truly or falsely, alleges such dealings; it also claims a balance on current accounts, and the accounts filed contain entries within 3 years plus the period to expire of the current year of the entry :—

It seems impossible, therefore, to say that the suit could properly be dismissed upon any thing which at present appears. As to the vakíl's supposed admission, it seems to amount to an inference from an argument, and it would not be safe to bind parties by assuming as true every matter of fact which must exist to make an argument tenable. The present section does not use the words "their factors or servants" which were part of the exception in the Statute of James. The mutual dealings, therefore, must be of merchants and traders. To be mutual there must be transactions on each side creating independent obligations on the other, and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations. It appears to us that the effect of this clause is to enact that nothing in an account of mutual dealings is to be barred, provided that there is one item indicating the continuance of such dealings proved to have occurred within the period of limitation. This is the construction finally put upon the English exception, in accordance with the final opinion of Lord Hardwicke in *Wilford* v. *Liddel* (2 Ves. 400.) The provision had been found so mischievous in England that it was abolished by Section 9 of the Mercantile Amendment Act. A slight consideration of the circumstances of this country would have effectually prevented its introduction here, even without the lessons of that experience. We are of opinion that the original decree must be reversed and the case remitted for the trial of the Issues:—(1) Whether there were mutual dealings as merchants or traders? (2) Whether one such dealing has taken place within three years plus the fragment of the year in which such dealing took place?

The year must be reckoned according to the mode of reckoning adopted in the accounts, if that mode adopts other than the ordinary year. 1871. *February* 10. *R. A. No* 73 *of* 1870.

If these issues are found in the affirmative, it will be necessary to take an account of the dealings and decree the balance due. The costs of this appeal should be provided for in that decree.

Suit remanded.

Appellate Jurisdiction. (a)

Special Appeal No. 573 *of* 1869.

N. A. CHERUKOMEN *alias* GOVINDEN NAIR ... ... } *Special Appellant.*

V. ISMALA and 2 others. ...*Special Respondents.*

It is not law that every right may be renounced. The general rule is power of renunciation, but there are two marked classes of exceptions:—There can be no renunciation of rights and consequent destruction of relative duties prescribed by an absolute law; nor of rights inherent in man as man. A man may renounce a concrete right, but not one resulting from a natural condition.

Semble, a karnavan cannot part, by contract, so as to be unable to resume them, with the privileges and duties which attach to his position as karnavan.

THIS was a special appeal against the decision of J. W. Reid, the Officiating Civil Judge of Calicut, in Regular Appeal No. 50 of 1869, confirming the decree of the Court of the District Múnsif of Shernád, in Original Suit No. 136 of 1867. 1871. *February* 14. *S. A. No.* 573 *of* 1869.

The suit was brought by plaintiff, under alleged authority given by the acknowledged original karnavan of the tárwad, to set aside the sale of certain lands, yielding annually Rupees 249, effected in execution of a judgment in No. 985 of 1861 on the file of the Múnsif of Shernád. Plaintiff produced certain documents, purporting to have been executed by 1st defendant in favor of Kelu Nair, the karnavan by seniority of plaintiff's family, and plaintiffs, as trustees of a pagoda, the family property, making over the lands, sale of which in execution of Original Suit No. 985 of 1861 was sought by this suit to be set aside.

The 1st defendant did not plead.

(a) Present :—Holloway, Ag. C. J. and Innes, J.

1871. February 14. S. A. No. 573 of 1869.

The 2nd and 3rd defendants declared these documents to be forgeries, and stated that the lands in question were subject to incumbrances really granted by 1st defendant and legally sold. That 3rd defendant purchased them at the auction and since transferred them to 1st defendant's younger brother, a party not included in this suit, who now holds them.

The District Múnsif dismissed the suit.

The plaintiff appealed.

Before the Civil Judge it was contended for the defendants that the plaintiff was simply Kelu Nair's agent in virtue of a certain agreement (exhibit D) filed in the suit, and that being so, that Kelu Nair had revoked the authority so given by him,

The following is a translation of exhibit D :—

" I, N. Kelu Nair execute this karar to my Anandravan Cheru Komen *alias* Govinden.

1. This karar I execute to you with my full consent for the safe preservation of the properties of our Ayagil tárwad and for the better management of our affairs in future.

2. You are required to manage all affairs relating to the said tárwad in the same manner as you did before, and further you are hereby authorized and appointed to exercise all managements solely.

3. Our karnavan Rarappan Nair had entrusted to my management [*certain lands specified*] but through my ill-management of the same Ráman Nair, who succeeded to the karnavanship on the death of Rarappan Nair, relieved me from the said management and took possession of the properties and allotting lands merely sufficient for the maintenance of me and others put me in possession of the same and under the arrangement that they should discharge all debts I had till then contracted, and that neither Ráman Nair nor the tarwad property nor the rest of the members of the family should be held answerable for any future debts, I ex-

ecuted to the said Ráman Nair a karar on the 26th Edavom 1034. 1871. *February* 14. *S. A. No.* 573 *of* 1869.

4. Although I have by the death of the said Ráman Nair become the karnavan of the tárwad, and although you have managed all affairs since the death of the said Ráman Nair in the same manner as you did with his consent during his life-time, yet since my co-operation in certain acts such as demising lands, conducting suits, causes hindrance in the conduct of such business and thus inflicts damage on the tárwad, I hereby authorize you with my full consent with a view to the prevention of such damage in future, to exercise solely by yourself all managements relating to the said tárwad.

5. By virtue of this authority you are to demise the tárwad lands, to conduct law suits and to exercise all other managements referring to the tárwad and all necessary acts solely by yourself, also to cause the performance of all ceremonies required by the tárwad and to protect the family in future in the same manner as you have hitherto done. If it perhaps becomes necessary to contract any debt for the use of the tárwad, or to raise further kanom in addition to the original kanom on the tárwad properties, the same shall be done with the express consent of all the other members of the family, and any debt incurred solely by you, otherwise than with their consent, shall be answered neither by the tárwad property nor by the rest of the family.

6. I hereby determine that if it become necessary to bring suits upon certain kaichits (bonds) of the tárwad written in my name also such suits shall be brought solely by you; that certain suits in which I am also included now pending should be conducted solely by you; and that all other acts that require to be done on behalf of the tárwad should be done solely by you, and that I should continue to receive maintenance as before.

7. As I have handed over to my Anandravan, Achutan, the lands before allotted to my maintenance, not only there is no tárwad property either in my possession or under my control, but that I will not interfere with any property or with the affairs of the tárwad, and if I interfere it shall not be valid.

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8. I also determine hereby that you are to pay annually.........my maintenance and in default to pay same with interest from date due, and for any sums you allow to fall into arrears you alone are to be answerable and not the tárwad property or the members of the tárwad. I accordingly sign and deliver this karar, &c."

Dated 13th Kány 1041.

The Civil Judge in his judgment said:—

"The case turns on this,—Was the agreement granted by Kelu Nair to plaintiff a power of attorney from a principal to an agent, or can it be upheld as a formal relinquishment of the karnavanship by Kelu Nair, and investiture of plaintiff with all the rights and privileges of the same, and this is a matter of Marumakkattáyam law.

The second respondent's vakil in his contention quoted the judgment of the High Court in Special Ap. No. 40 of 1864, and urged that the point there ruled—"That the right of the eldest member of a Nambúdiri family to manage the illom is absolute, and where a junior member has in fact managed it, then this is presumed to have been with the permission of the former, who may at any time take up the actual control," applied by analogy to this case, and in that case the Civil Judge in his decree, which was confirmed by the High Court, observed that "The 2nd defendant is now the karnavan and it is quite possible that he may have given plaintiff permission to assume an extensive authority in the illom. But he may still reserve in his hands the rights of the karnavan, although the management may be deputed or permitted to remain in the hands of another. Admitting the plaintiff to be in management, I still consider it would be a very unwise precedent to set aside the authority of the karnavan on that account alone,—so far as can be done it is the duty of the Court to uphold usage and custom. How will usage and custom apply in the case under consideration. I take it unless the karnavan has been proved utterly incompetent and be deprived of his rights by decree of Court, the Court has no authority to depose him, because an anandravan may be manager,—he may be so by permission or delegation, but as long as there is neither a decree nor any family bond set-

ting him aside, the authority of the karnavan must be upheld." The High Court confirmed the decree and observed that "the right of the eldest member of a Nambúdiri family to manage the property as karnavan is absolute, and where, as here, a junior member has in fact managed it, this is presumed to have been with the elder member's permission, and he may at any time interfere and take the actual control."

1871. *February* 14. *S. A. No.* 578 *of* 1869.

After mature consideration, I am induced to consider the analogy of the above precedent rules here, and in the absence of any decree of Court or family bond incapacitating Kelu Nair as karnavan, for the appellant's vakil, in a statement taken from him by this Court, acknowledges that the agreement on which appellant rests his power to sue was given of the karnavan Kelu Nair's own accord, with no pressure from, although with consent of the tárwad, I must hold that Kelu Nair had a right to cancel the agreement and confirm the Munsif's decree and dismiss this appeal with costs."

The plaintiff appealed to the High Court on the ground that the Civil Judge was wrong in law in holding that the plaintiff was not entitled to sue.

Mayne, for the special appellant, the plaintiff.

O'Sullivan, for the 2nd special respondent, the 2nd defendant.

The Court delivered the following judgments:—

HOLLOWAY, Acting C. J.—It is conceded for the purposes of this argument that the authority of the plaintiff to institute suits has been withdrawn by the karnavan, so that the decrees below are right unless the document D, which originally vested in the plaintiff a power not naturally belonging to him, was an irrevocable waiver of the karnavan's rights and an irrevocable transfer of them to another. Both are wanted to sustain this suit.

The better construction of that document seems to me to be that it is a power of attorney, probably induced by the great powers of annoyance which this plaintiff, the delegate of a former karnavan, would have possessed.

Clause 7 is the only one which could be construed as an entire abandonment of the karnavan's rights, and this is

1871. February 41. S. A. No. 573 of 1869.

a clause constantly inserted in private agreements of the members of a Malabar family, in the hope that rights, validly passed to third parties, may hereafter be defeated by the production of the agreement. It is precisely similar to the restrictions placed upon the acts of the plaintiff in the 5th clause. The whole document, however, throughout treats the matter as if the powers to be possessed by the plaintiff were such as the karnaven by the writing conveyed, and is certainly more consistent with delegation than waiver.

It becomes unnecessary, therefore, to consider whether by contract a karnavan could part, so as to be unable to resume them, with the privileges and of consequence with the duties which attach to his position as karnavan. The proposition for which Mr. Mayne broadly contended, that a man may waive any rights, is certainly not law.

The general rule is power of renunciation, but there are two marked classes of exceptions. There can be no renunciation of rights and consequent destruction of relative duties prescribed by an absolute law. (The case of the departing father declaring the tutors *anecloglisti*) "ut ait "Iulianus et est vera ista sententia: nemo enim ius publi-"cum remittere potest huius modi cautionibus nec mutare "formam antiquitus constitutam." Another is the case of rights inherent in man as man, or, as some would prefer saying, the natural conditions which are the source of rights of condition. "Ius adgnationis non posse pacto repudiari non "magis quam ut quis dicat nolle suum esse Iuliani sententia "est." A man may renounce a concrete right but not one resulting from a natural condition. In English law the first of these exceptions has been frequently recognized (*Hunt* v. *Hunt*, of which I have a note but no report). It is sometimes said there, that on principle a man may renounce a right, but not one coupled with a duty.

It would therefore be doubtful, even if the words used distinctly amounted to a renunciation and transfer, whether looking at the nature and modification of a karnavan's rights, it would be possible to construe them as amounting to more than a revocable delegation. I am of opinion that the special appeal must be dismissed with costs.

INNES, J.—I think it is doubtful on the document whether the intention of the karnavan was not entirely to transfer his rights as karnavan. If it were not so, the document is merely a power of attorney, and the authority conveyed by it is revocable. If on the other hand the intention of the karnavan, as expressed by the document, were to transfer his rights absolutely, it would be, I apprehend, an invalid instrument. A man cannot assign obligations (*i. e.* cannot substitute some one else as the performer of his duties) without the consent or authority of those to whom the duties are owing, and whereas, in the present case, rights are co-existent with and inseparable from obligations, so that the assignment of the one cannot be effected without the assignment of the other, there can be no valid transfer of rights without the consent and authority of those interested in the performance of the obligations.

1871. *February* 14. *S. A. No.* 578 *of* 1869.

I concur, therefore, in dismissing this special appeal and with costs.

Appeal dismissed.

Appellate Jurisdiction. (*a*)

Special Appeal No. 362 *of* 1869.

THIAGARA'JA MUDALI.................*Special Appellant.*
RAMANUJA CHARRY and others... ...*Special Respondents.*

Special Appeal No. 284 *of* 1870.

CHINNASA'MI CHETTI....................*Special Appellant.*
NANJAPPASARY and others..............*Special Respondents.*

Regular Appeal No. 69 *of* 1870.

JUNJLA VENKATARA'YADU................*Appellant.*
JUNJLA KAMAMMAH and another... ...*Respondents.*

The valuation of the matters of litigation for the purpose of determining the jurisdiction of Múnsifs is to be made in the mode prescribed by Sec. 11, Regulation VI of 1816 and Regulation III of 1833 and not in that prescribed in the Stamp Acts.

THE question referred from these appeals for the decision of the full Court, was whether the value of a suit for the purpose of ascertaining the jurisdiction of the District Munsif's Court should be estimated on the amount of the annual produce of the land in dispute, under Section 11, Regulation

1871. *March* 20. *S. A. No.* 362 *of* 1869. *S. A. No.* 284 *of* 1870. *R. A. No.* 69 *of* 1870.

(*a*) Present :—Holloway, Innes and Kindersley, J. J.

1871. March 20. S. A. No. 362 of 1869. S. A. No. 284 of 1870. R. A. No. 69 of 1870.

VI of 1816, in the manner provided by Regulation III of 1802, or on the value stated in the plaint as required by the Stamp Act.

The *Acting Advocate General* and *Sloan* contended that the value for the purposes of jurisdiction is to be calculated according to the mode prescribed in the Regulations VI of 1816 and III of 1833.

Sanjiva Ráu contended that the valuation arrived at by the mode prescribed by the Stamp Acts was to be taken to be the valuation for the purpose of determining jurisdiction.

The arguments of Counsel, and the Regulations and Acts cited, sufficiently appear in the following judgments :—

HOLLOWAY, J.—The question is whether the valuation of the matters of litigation for the purpose of determining the jurisdiction of Múnsifs is to be made in the mode prescribed by Section 11, Regulation VI of 1816, and Regulation III of 1833, or in that prescribed by the long array of recent Stamp Acts. More precisely stated the question really is, are we to retain the limitation contained in those Regulations as to the compass of the jurisdiction, but alter the mode of calculation by which the amount governing that compass is to be arrived at ? We should thus be retaining the Regulations as to the limit of the jurisdiction, but altering their entire scope by varying the mode of calculation. I freely confess that but for a dissenting opinion to which no man attaches more weight than I do, the question would be to me free from difficulty. These two Regulations are unrepealed expressly, and the question is whether they have been so impliedly. They are Regulations dealing with a special matter, and their implied repeal by any subsequent Act, general in its scope, would be matter of great difficulty.

I will state the rule as to implied repeal as laid down by a great authority, and the statement will be found to be in accordance with many, if not most of the English cases. " There is a tacit repeal of an earlier law by a later when " the new embodies upon the same object matter a new

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"determination which contradicts that embodied in the "old."—*Unger* I. 130. It appears to me that the object of the one Act is to determine jurisdiction, and that of the other to determine fiscal consequences, and that these have no necessary, but merely an accidental, connection. The Regulation deals with annual value and the Stamp Act with market value, and, to determine what is annual value, we must still look to the construction which the Regulation has acquired. If itself unrepealed, the fact that it has acquired that construction from a Regulation which has itself been repealed will not prevent the continuance of the old construction, unless the repealing Act, or some subsequent Act, has put upon the words a new construction inconsistent with the old one, and so put it as to require the substitution of the new one for the old. Now, upon annual produce, the Act has put no construction at all. It seems to me clear, therefore, that the old Regulation subsists as it did before, and being the only Regulation determining the jurisdiction, the question of jurisdiction is to be settled exactly as it would have been if the Stamp Acts had not been passed. I do not at all mean to imply that this special Regulation could have been repealed by a general Act, but I am clear that if it could be, it has not been.

The Stamp Acts have really remedied a strange inequality of the old law, which assessed the stamp as to all property except real property upon the actual value.

If I could think that the Stamp Act had any necessary connexion with jurisdiction of Múnsifs, it would appear to me more natural to embody in the old Regulation the sum increased according to the new calculation, which would then, according to the intention of the Regulation, be the sum which was to measure the jurisdiction, and this would leave matters exactly as they were before. The true construction, in my opinion, is that the calculation for the purpose of the stamp is by one mode of calculation, and that for the purpose of the jurisdiction by another. Within Section 5 of the Procedure Code, I am of opinion that Regulation VI of 1816, with its acquired interpretation, is the aw in force for determining the jurisdiction of Munsifs,

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INNES, J.—In consequence of a difference of opinion between the Chief Justice and myself, before whom Special Appeal No. 362 of 1869 was heard, the question in this and two other cases has been referred for the opinion of the full Court. The question which we have to decide in Suit 362 is, whether the pecuniary jurisdiction should have been determined by the value ascertained according to the provisions of the Stamp Law XXXVI of 1860, and the question in the other two suits is the same in principle, the Stamp Law applicable being Act XXVI of 1867 as the value for jurisdiction. To determine it, it is desirable to see what the course of the legislation bearing on the subject has been. By Section 3, Regulation III of 1802, the Courts of Adálat, established in the several zillahs, were required to state precisely the matter of the complaint, and, in suits for land, to set out the amount of the annual produce. The section lays down the mode in which the annual produce is to be calculated, and in suits other than for land directs that the exact sum of money or amount of damages be stated. By Section 2, Regulation XII of 1809, the jurisdiction of the Zillah Courts became limited to claims to land paying revenue to Government, of which the annual produce, computed according to Section 3, Regulation III of 1802, was 5,000 Rupees in value, and claims to lakhiráj land, of which the annual produce was 500 Rupees. The pecuniary limit in other suits was to be determined by the computed value, or the amount of the subject-matter of the claim.

As the meaning of the words 'annual produce' had been expressly defined by Section 3, Regulation III of 1802, and in the enactments passed since that Regulation no different meaning had been assigned to them, it would be a fair conclusion that, in the computation of the annual produce in the case of lakhiráj equally with malguzári land, the provisions of Section 3, Regulation III of 1802, were intended to be the guide.

It is true that the express reference to Section 3, Regulation III of 1802, as applicable to the case of malguzári lands, and the omission of such reference in the sentence immediately following in respect of the other, may seem to

imply that the application of the rule contained in Section 3, Regulation III of 1802, was intended to be limited to the computation of the annual produce in suits for malguzári lands. But there seems to be no reason for any distinction being made, and, looking at the object of Section 2, Regulation XII of 1809, which was to limit a jurisdiction which had hitherto been unlimited, I think that the important words are those which fix the pecuniary limit, and that the reference to Section 3 is merely parenthetical, and intended to point out generally the particular enactment in which the words 'annual produce' are explained in the sense in which they are intended to be used by the Legislature *throughout the Section*, and that they should be read, therefore, as applying to lakhiráj as well as to malguzári lands. And I think it will appear that the subsequent legislation in making no such distinction supports this view. Nor does the rule contained in Section 2, Regulation XII of 1809, for the computation of the pecuniary limit in other suits, differ materially from that laid down in Section 3, Regulation III of 1802, for computing the value to be stated in the plaint.

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In fact, Section 2, Regulation XII of 1809, partly by reference and partly by the use of similar though less precise language, appears to adopt in their entirety (as a basis for determining the amount or value upon which the jurisdiction is to depend) the rules laid down by Section 3, Regulation III of 1802.

In 1808, Regulation V was passed, establishing *ad valorem* institution fees on suits. In the valuation of lands, the fees were to be calculated on the annual produce of malguzári, and ten times the annual produce of lakhiráj. In each instance the computation is to be made according to Section 3, Regulation III of 1802. In suits for money or the value of personal property, *on the amount or value*, and in suits for houses, tanks, grounds, or other real property, not being malguzári or lakhiráj land, on the estimated value. This Regulation was followed by Regulation XVII of 1808, which repealed it, and re-enacted substantially, in Section 6, the same provisions as to the basis of computation of the duty payable in suits.

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Regulation XIII of 1816 was the next Stamp Act. It prescribes *ad valorem* duties for suits, and, in Sections 13 and 14, follows the previous stamp and fees enactments, in making the annual produce in suits for malguzári, and ten times the annual produce in suits for lakhiráj land, and in other suits, the estimated value (calculated according to Section 3, Regulation III of 1802), the basis of calculation of the value of the claim for stamp purposes. By Section 31 of this Regulation, the Courts of the District Múnsifs which were established by Regulation VI of 1816 were exempted from its operations. This was the last Stamp Act passed prior to the creation of the Principal Sadr Amíns' Courts in 1827, and it seems clear that, so far, the valuation of suits for stamp purposes had not determined the valuation for jurisdiction, but that in suits for land paying revenue to Government, the value for stamp purposes and the value for jurisdiction were both determined by the value of the annual produce; while in suits for lakhiráj land, the value of the annual produce determined the pecuniary jurisdiction and of ten times that produce the amount of stamp payable. By Regulation VII of 1827, the Courts of the Principal Sadr Amíns were established. They were then called Courts of Native Judges. Section 5 makes applicable to them the provisions of Sections 5 and 9 of Regulation I of 1827.

Now, by Regulation I of 1827, certain Courts called Courts of Assistant Judges had been created, and, by Sections 5 and 9 of that Regulation, those Courts are vested with the jurisdiction and functions of the Courts of the Zillah Judges, and made subject to the same rules of procedure. Section 9 declares that all the provisions of the Regulations which are now in force, or may hereafter be enacted for the guidance of the Zillah Judges in their proceedings and decisions, &c., &c., "shall, as far as consistent with this Regulation, be applicable to Assistant Judges appointed under this Regulation." This amounts to an incorporation into this Regulation of all such enactments as were then in existence applicable to Zillah Judges and not repugnant to the letter or spirit of this Regulation. Thus, by Section 5 of Regulation VII of 1827, the Courts of the Native Judges (afterwards by Act VII of 1843 styled Principal Sadr Amíns) were

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placed in the same position as to jurisdiction and procedure (with certain specified exceptions) as the Zillah Courts, and had, consequently, to be guided by the same rules for determining the value of the suits before them for purposes of jurisdiction and stamp duty; and the Regulation creating these Judgeships must be considered as embodying in its provisions the rules contained in Section 3, Regulation III of 1802, and Section 2 of Regulation XII of 1809 as to the computation of the value of suits in determining the jurisdiction.

By Act VII of 1843, the restriction on the pecuniary jurisdiction of the Zillah Courts was removed, and the jurisdiction of the Courts of the Principal Sadr Amíns was extended to 10,000 Rupees. As to *Zillah Courts*, Section 2, Regulation XII of 1809, may be regarded as having been impliedly repealed by Act VII of 1843, but, in virtue of Section 5, Regulation VII of 1827, its provisions having reference to the *mode* of computation of value for determining the jurisdiction still survived to the Courts of the Principal Sadr Amíns, although the pecuniary limit laid down by it had been altered and extended.

Before passing on to the later Legislation on the subject of stamp duty, it is desirable to see what, at this point (1843), was the position of the District Múnsifs' Courts upon this question.

The Courts of the District Múnsifs were established in 1816 by Regulation VI. They took the place of the Courts of the Native Commissioners. Institution fees were levied at certain rates prescribed by the Regulation. Section 11 prescribes the pecuniary limits of the jurisdiction, and Section 16 then declares the rates that are to be levied according to the amount or value of the claim.

The pecuniary limit in land paying or exempt from revenue to Government is calculated upon the *annual produce*, and in case of other immovable property upon the *value*, and in case of money or personal property on the *amount or value*. The bases of computation in Section 11, therefore, seem in no respect to differ from those prescribed for the Zillah Courts in the same matter in Section 2, Regu-

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lation XII of 1809, and Section 3, Regulation III of 1802, and although by Regulation III of 1833, the pecuniary limit of the jurisdiction of District Múnsifs' Courts was extended, the basis of calculation of that pecuniary limit continued the same.

In the case of malguzári and lakhiráj land, the basis is the '*annual produce*,' and as the words 'annual produce' had received a legislative interpretation in Section 3, Regulation III of 1802, and which had also been adopted in Regulations V and XVII of 1808, and in Section 2, Regulation XII of 1809, and was in force as to Zillah Courts by virtue of this last quoted enactment in 1816 (as is clear from Section 11, Regulation XV of 1816), there is ground for inferring that the words 'annual produce', as occurring in Regulation VI of 1816, had acquired a technical meaning in the legislation of those times, and were intended to be interpreted in the sense given to them in Regulation III of 1802

By Section 31 of Regulation XIII of 1816 (Stamp Act), District Múnsifs' Courts were expressly exempted from its provisions, and it was not till 1848 that that enactment was made applicable to them. But the effect of Act XVII of 1848, so far as the present question is concerned, was simply to extend to the District Munsifs' Courts the provisions of Section 14, Regulation XIII of 1816, which applies the rules contained in Section 3, Regulation III of 1802, for computation of the annual produce, which in suits for land paying revenue to Government is, for stamp purposes, to be taken as the value, while in suits for lakhiráj lands ten times the annual produce is to be so taken. Up to this point, therefore, the basis for determining whether a suit was within the pecuniary limit assigned to the jurisdiction had been employed also as the basis for determining the value for stamp purposes in all the Courts of limited jurisdiction.

In 1860, the General Stamp Act was passed, and Schedule B of this enactment prescribes rules for computing the value of suits.

Rule '*b*' is to this effect "within the Presidency of "Madras in suits for land paying revenue to Government,

"the *value of the property* shall be assumed at the amount "of the annual aggregate produce of the land computed as "payable by the dependent talukdárs, under-farmers and "ryots on account of the year in which the suit may be "preferred," *i. e.*, at the amount of annual produce, as calculated according to the rule in Regulation III of 1802, which had been adopted in Regulation XIII of 1816, and as to other suits (except in the case of claims to lakhiráj lands), the provisions of the enactment are substantially, though in more precise language, the same as the rules in Regulation III of 1802, but in regard to lakhiráj lands a new rule is introduced. It runs as follows :—

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"In suits for lakhiráj inám or rent-free lands, the va-"lue shall be calculated at 18 times the rent payable by "the ryots or other under-tenants of the land."

The ncame Act X of 1862, which, in regard to suits for land, re-enacted in its Schedule B the same rules as those to be found in Act XXXVI of 1860.

Prior, however, to the enactment of Act X of 1862, Section 3, Regulation III of 1802 had been expressly repealed by Act X of 1861. But, as before observed, the rule contained in Section 2, Regulation XII of 1809, postulates a reference to Section 3, Regulation III of 1802. And the words of Section 9, Regulation I of 1827, are wide enough to embrace the provisions of Section 2, Regulation XII of 1809, and this rule, as explained already, was by Section 5, Regulation VII of 1827, made applicable to the Courts of the Principal Sadr Amins. Now both these sections in these two Regulations have been rescinded by Act X of 1861 "so far as relates to suits and proceedings under Act VIII of 1859," and there arises, therefore, a question whether this rescission extends to the mode of computation hitherto in use for determining whether a suit was within the jurisdiction. I am of opinion that it does not. I take it that what is meant by "so far as relates to suits and proceedings under Act VIII of 1859" is to be interpreted "so far as the rescinded section renders applicable to the Courts of the Principal Sadr míns, Arules of procedure which have been superseded by Act VIII of 1859, or so far as relates

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to proceedings which may now be taken under Act VIII of 1859, in supersession of the former procedure."

Now Act VIII of 1859 contains no rules for determining whether a suit is or is not within the pecuniary limit prescribed by law, and it seems to me, therefore, that Act X of 1861 did not in this respect work a repeal of this section.

But Regulation XII of 1809 also was repealed by Act X of 1861, so that, unless the rules it contains still survived in Regulations I and VII of 1827 at the date at which Act X of 1862 (Stamp Act), came into operation, the Courts of the Principal Sadr Amíns would be without any express rule as to the mode of ascertaining whether a suit was beyond the pecuniary limits of their jurisdiction, and it might then be inferrible that the Legislature, in laying down a mode of valuation of a claim for stamp purposes, intended that it should be adopted as the mode of valuation of claims for other purposes, for which the mode of valuation previously prescribed by law had ceased to exist. Is the effect, therefore, of Sections 5 and 9, Regulation 1 of 1827, and Section 5 of Regulation VII of 1827, such as to preserve to the Courts of the Principal Sadr Amíns the provisions of Section 2, Regulation XII of 1809, notwithstanding the repeal of that Regulation by Act X of 1861?

I think that *Reg.* v. *Inhabitants of Merionethshire* (13 L. J., (N. S.) M. C. 158, and 6 Q. B. 343) seems an authority in point. Section 2, Regulation XII of 1809, was enacted with reference to the functions of Zillah Judges, and it was afterwards made applicable, with other Regulations, to a different class of Judges, called now Principal Sadr Amíns. The enactment so making it applicable must, from its language, be regarded as incorporating with it, in reference to Principal Sadr Amíns, all the provisions of the law (this included) relating to Zillah Judges, except such as are expressly excepted. And this being so the provisions of Section 2, Regulation XII of 1809, relating to the Courts of Zillah Judges, must be held to have still been surviving to the Courts of the Principal Sadr Amíns, as part of Regulation VII of 1827, at the date of the enactment of Act X of 1862.

Then, in regard to the District Múnsifs, Section 11, Regulation VI of 1816, was still unrepealed, and must be held to have been in force at the date of the institution of this suit. Unless, therefore, the provisions of Section 2, Regulation XII of 1809 (as surviving in Section 5, Regulation VII of 1827), and Section 11, Regulation VI of 1816, can be considered as having been virtually superseded by the Stamp Act XXXVI of 1860, it seems to me that we must hold that the Courts of limited jurisdiction of the Principal Sadr Amíns and District Múnsifs are still to be guided in determining the limit of their jurisdiction by the law which was in force prior to and at the date of Act XXXVI of 1860.

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The question cannot arise in cases falling to be valued for stamp by Act XXXVI of 1860 *in respect to malguzári lands*, since the annual produce for one year determines both the limit of the jurisdiction and the value of the stamp.

The only kind of property as to which the question directly arises under Act XXXVI of 1860 is lakhiráj land.

By the rules for determining the pecuniary jurisdiction as to such land which were in force as to the Courts of the District Múnsifs and Principal Sadr Amíns at the date of Act XXXVI of 1860 coming into operation, we must look to the *annual produce*. If the annual produce is in value above a certain amount, the jurisdiction is gone, whatever may be the value of the *claim*. The Stamp Act provides for certain *ad valorem* charges on claims, and then goes on to say how claims are to be valued. In lakhiráj suits the value is to be 18 times the annual produce. There is no repugnancy. The value of the annual produce determines the jurisdiction—18 times the annual produce determines the value for stamp purposes. Looking also at Act XXXVI of 1860 throughout, I can see in it no other purpose or object than to provide a stamp revenue, and I think that had there been any such object as that of substituting a rule, the tendency of which would necessarily be to narrow, in respect to one class of land at least, the jurisdiction of those Courts before which the principal litigation of the country comes, something to that effect would have been clearly and unmistakeably expressed.

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There is nothing of the kind in Act XXXVI of 1860, nor is there in this nor in the subsequent enactments, Act X of 1862, Act XXVI of 1867 and Act VII of 1870, anything to suggest that Act XXXVI of 1860 was enacted for any other than stamp purposes. Section 32 of Act X of 1862 seems to point clearly to the levying of stamp duty as the exclusive purpose of that Act, and the language of note *a*, Section 11 of the schedule to Act XXVI of 1867, " The amount of stamp duty payable shall be computed," &c., seems to show with abundant clearness that the valuation of property to which this note relates is a valuation for stamp purposes alone.

There is nothing in the language of Act VII of 1870 from which it could be properly inferred that valuations for purposes of jurisdiction are for the future to be founded on its provisions, and, further, there is a schedule appended of provisions of the Statute law which are by the Act expressly repealed, all confined in their object to the levying of fees. Now as these later enactments fail to disclose any but a fiscal purpose, and the latest of them, by the enactments which it expressly repeals, implies that the change which it introduces is in that part of the law which relates to the levying of fees, there is, I think, very sound reason for concluding that they were not intended to provide any guide to the determination of the pecuniary jurisdiction of the Courts. It appears to me, therefore, that there is no ground for saying that the provisions in force up to the date of Act XXXVI of 1860, for ascertaining the pecuniary jurisdiction of the Courts of limited jurisdiction over suits coming before them, have been impliedly repealed by Act XXXVI of 1860, but that, on the contrary, the provisions of the law in Section 11, Regulation VI of 1816, as regards the Courts of the District Múnsifs, and in Section 5, Regulation VII of 1827, as regards the Principal Sadr Amíns' Courts still survive, and that by them the Courts of the Múnsifs and Principal Sadr Amíns, respectively, are bound. The former by express words, and the latter by provisions of the law which are incorporated with it, form the sole guides to these Courts for determining whether the pecuniary limits of their jurisdiction extend to suits instituted in

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them. It follows that in Suit No. 362 there must be an issue to the Principal Sadr Amín to determine what is the value of the claim. In Suit No. 284 the decree of the Civil Judge must be reversed, and he must be directed to decide the suit on its merits, as it is clearly within the jurisdiction of the Múnsif's Court, and in Regular Appeal No. 69 the decree of the Civil Judge must be affirmed, as the suit was clearly within the jurisdiction of the Múnsif's Court.

KINDERSLEY, J.—It is, of course, obvious that there is no necessary connection between the valuation of a suit for purposes of jurisdiction and the valuation for purposes of taxation. The only question is whether such a connection has been created by Acts of the Legislature.

When the jurisdiction of the District Múnsifs' Courts was defined by Regulation VI of 1816, the words "annual produce" had already a technical legal meaning given to them by Regulation III of 1802, and it cannot be doubted that the authors of Regulation VI of 1816, in using those words, intended them to be taken in that technical sense. And the meaning of the words in Regulation VI of 1816 has not been affected by the repeal many years afterwards of the regulation which first gave them that meaning.

Prior to 1816 the mode of valuation for purposes of taxation was the same as the mode of valuation for purposes of jurisdiction, and the first divergence appears to have been introduced by Regulation XIII of 1816, with respect only to the valuation of lands exempt from the payment of revenue to Government. The valuation of lands paying revenue to Government continued the same for purposes of taxation as for purposes of jurisdiction until the Stamp Act of 1867, by which the criterion of the market value was for the first time introduced. Act XXVI of 1867 purports to have been enacted because it was expedient to amend the law relating to stamps, and I have not been able to find any indication that it was intended to affect the jurisdiction of the Courts. It appears to me that if the intention of affecting the jurisdiction of the District Múnsifs' Courts had been in the minds of those who passed the Act, they would have expressed such intention. The original identity in the mode of valuation for both of the purposes above-

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mentioned was convenient, but I think it was only incidental, the Legislature never laid it down as a principle that the identity was always to continue, and the connection between the two purposes of valuation to be indissoluble. And, therefore, when a new criterion of valuation was introduced for stamp duty, I do not think that it carried with it by implication a new criterion of valuation for jurisdiction. For these reasons I concur in the judgment of Holloway and Innes, J. J. rather than in that of the Chief Justice.

Appellate Jurisdiction. (a)

Special Appeal No. 9 of 1870.

CHOCKALINGA PILLAI ... ... *Special Appellant. (Defendant).*

VYTHEALINGA PUNDARA SUNNADY... *Special Respondent. (Plaintiff).*

Ejectment by landlord against tenant. It appeared that the land in dispute was the property of a muttum of which the plaintiff was the trustee: and had been let to the defendant's father under a muchalka (Exhibit A), dated 14th August 1837, entered into with the Collector, the manager of the property on behalf of the Government. The tenancy continued to be regulated by this agreement until plaintiff, in 1867, demanded an increased rent, which the defendant refused to agree to pay. Upon that demand and refusal, the plaintiff, at the end of the fasli, and without tendering a pattah for another fasli stipulating for the increased rent, brought his suit to eject. The defendant (appellant) contended that the right to put an end to his tenancy was conditional upon his failure to pay the rent fixed by the agreement. *Held* by SCOTLAND, C. J., upon the construction of the muchalka, that the plaintiff possessed the absolute right to put an end to the tenancy at the end of a fasli, unless the condition relied upon by the appellant was, by force of established general custom (which had not been alleged), or positive law, made a part of the contract of tenancy. That neither the Rent Recovery Act nor the Regulations operated to extend a tenancy beyond the period of its duration secured by the express or implied terms of the contract creating it. That, therefore, the plaintiff had a right to eject the defendant at the end of a fasli.

By HOLLOWAY, J.—That whether the express contract was binding on the pagoda or not, it gave no right to hold permanently, and that there is nothing in any existing written law to render a tenancy once created only modifiable by a revision of rent, but not terminable at the will of the lessor exercised in accordance with his obligations.

Enamandaram Venkayya v. *Venkatanáráyana Reddi* and *Nallatambi Pattar* v. *Chinnadevanáyagam Pillai* (I M. H. C. 75 & 109) doubted.

The judgment in the case of *Venkataramanier* v. *Ananda Chetty* (V. M. H. C. 122) has gone too far in laying down the rule as to a pattahdár's right of occupation.

1870. August 5. 1871. May 1. S. A. No. 9 of 1870.

THIS was a Special Appeal against the decree of the Civil Court of Tranquebar, in Regular Appeal No. 114 of 1868, confirming the decree of the Judge of the Court of

(a) Present :—Scotland, C. J. and Holloway, J.

Small Causes at Negapatam on the Principal Sadr Amín's Side, in Original Suit No. 5 of 1868.

1870. August 5. S. A. No. 9 of 1870.

The plaintiff, as trustee of the Tiruppalur Sriajneshwarasámy muttum, sued to recover certain Covil lands, which were leased to defendant under a deed of agreement A, dated 14th August 1837, entered into between him (defendant) and the Government, who at that time held the management of pagoda property, on the grounds (1) that said defendant refused to pay his swamibhogam in kind; (2) that he failed to send servants to assist in the pagoda service during 3 years, and (3) that a larger amount of swámibhogam was offered by a third party than defendant would agree to pay. The defendant contended that under the terms of the agreement deed A, he possessed an hereditary title to the perpetual tenure of the land in question; that, for 30 years, he had paid swámibhogam in money and at a fixed annual rate, so that plaintiff had no right to demand an enhanced payment in paddy; that no feast had been celebrated during the last year by the mutt; and that therefore servants were not required that year, but that, in all other years, servants were sent for the use of the pagoda.

The following is a translation of the material parts of Document A:—

"I, Pudukkidai Subba Pillai, having agreed to cultivate the said village of Nagur from fasli 1247 according to the taram faisal (classification of the lands) thereof, do hereby execute this Ijárá muchalka to N. W. Kindersley, Esq., Principal Collector of Tanjore (on behalf of) the Company's Sircár, under date the 14th August 1837.

I have taken up for cultivation the following lands of the said village.........

(Here enter particulars of lands.)

According to the annual settlement made by the Sircár, I hereby bind myself to pay to the Sircár, in the presence of the village pattadár, the sum of Rupees 133-7-6¼ inclusive of the Sircár jamábandy and swámibhogam according to the (following) scale of kists.........

(Here enter the scale of kists.)

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If there should fall any arrears in so paying, you shall realize the same by attaching and selling my private property according to law. I will never pay to any one even a cash in excess of the said tírvai fixed for the lands mentioned in this muchalka. If the pattadár, the village curnum, and others should demand or collect (from me) any sum in excess, I shall then and there lodge a complaint with the Huzur. If in any year, I should plant betel, plantain trees, sugar cane, or raise any such garden products as tobacco, onion, garlic, &c., with the (Sircár) water in the said village, I shall furnish the Sircár with a true account of the same, and not only pay the taram tírvai fixed for so much of the land as is cultivated with the said crops, but also pay the tírvai jashti in those years (when the Government water may be availed). If I should cultivate waste and poramboke lands, &c. in addition to those mentioned in this muchalka, I shall pay the taram tírvai fixed on such lands during the years in which they may be cultivated.

[Here follow covenants to pay servants, execute repairs, etc.] If I should raise a second crop on the taladi (2 crops) lands mentioned in this muchalka, I shall pay the tírvai thereof according to the rules of taladi (i. e., of 2nd crop). If, per chance, loss should be occasioned in any fasli by inundation or drought through accident, the Sircár should inspect the same and grant a reasonable remission according to mamul. I shall pay the mélwaram of the nunjah lands of the said village according to the permanent taram tírvai which has been fixed at 3$\frac{5}{16}$ fanams per kallam. If this price should either rise or fall, the gain or loss thereby accruing is mine and the Sircár shall have nothing to do with it ....As the permanent tírvai has been fixed, and as I have assented thereto, as stated above, I shall pay to the Sircár, the taram tírvai fixed on each Numberwar field. Thus do I execute this muchalka."

The Court of First Instance decreed for plaintiff.

The defendant appealed.

The Civil Judge, confirming the decision of the Principal Sadr Amín, said—

"The decision of this case depends entirely upon the construction to be given to the muchalka Exhibit A, which

is admitted by both parties in the suit. This agreement was entered into by defendant's father deceased with the Collector, and in the first part of the deed Subba Pillai engages to cultivate the village of Nagur on the annual money rent fixed in the pymash settlement account of fasli 1238, but not to pay even a cash more than that amount, and explicitly declares that if any sum in excess is demanded by the village authorities, he will forthwith complain to the Sircár. There are no express terms to be found in the instrument showing that defendant possesses any hereditary right to the perpetual tenure of the lands in dispute, and the latter clause of the exhibit A, above quoted, would seem to infer the possibility of an enhanced rent being demanded, when such question, if raised, should be submitted to the Collector for settlement.

1870. *August 5.* *S. A. No. 9 of 1870.*

Had it been the intention of defendant's father to enter upon an absolute engagement to cultivate the lands of the muttum for ever, he would no doubt have plainly given expression to such proposition; and there is nothing adduced in evidence to show that, on the Collector's part, any such perpetual tenure of the land was contemplated.

A larger rent has been offered by a third party to the pagoda authorities, and defendant admits that he has refused to pay anything more than the present amount of rent. In the absence of any express stipulation insuring to defendant any more stable and permanent hold on the land, he must be regarded as a tenant at will, and must surrender the land to another, who is prepared to pay a larger rent."

The defendant preferred a special appeal to the High Court on the ground that the decree of the Civil Court was wrong in law, in that, upon the proper construction of A, the defendant was entitled to remain in possession so long as he was willing to pay the rent stipulated therein.

Mayne, for the appellant.

Sanjiva Ráu, for the respondent.

The Court this day delivered the following judgments:—

1871. *May 1.*

SCOTLAND, C. J.—This is an appeal from a decree passed in the plaintiff's favor in an ejectment suit brought by a landlord against his tenant, and the question for determi-

1871. May 1. S. A. No. 9 of 1870.

nation is whether the plaintiff had the right to put an end to the defendant's tenancy at the end of a fasli, because of his refusal to pay an increased amount of rent demanded by the plaintiff. It appears that the land in dispute is the property of a muttum of which the plaintiff is the trustee; and was let to the defendant's father, since deceased, under the muchalka or agreement (Exhibit A), dated the 14th of August 1837, entered into with the Collector, who, at that time, was the trustee and manager of the property on behalf of the Government, and the tenancy has continued to be regulated by the terms of that agreement, without objection, until the plaintiff, in 1867, demanded an increased rent, which the defendant refused to agree to pay. Upon that demand and refusal, the plaintiff, at the end of the fasli, and without tendering a pattah for another fasli stipulating for the increased rent, brought his suit to eject the defendant. The contention on behalf of the appellant is that the right to put an end to his tenancy was conditional upon his failure to pay the rent fixed by the agreement.

Obviously the precise legal effect of the agreement (Exhibit A) is the first thing to be satisfied about, and there can be no doubt, I think, that looked at by itself, it does not evidence more than a contract of letting from fasli to fasli at the yearly rent specified; in other words, a tenancy determinable at the end of each fasli. There are stipulations in it which show that the parties contemplated the continuance of the tenancy without any change of terms for several faslis, but they are indefinite as to any period of time except that of the fasli, and clearly, therefore, did not bind the will of either party beyond the currency of each fasli while the tenancy remained undetermined. In short, the language of the agreement had, I think, no greater effect than the ordinary form of muchalka given by a ryot in exchange for a pattah, except so far as it indicated the intention that its terms should apply to every successive fasli for which the holding might be continued by neither party exercising the right to terminate it at the end of a fasli.

From this construction it follows that the plaintiff possessed the absolute right to put an end to the tenancy at the end of a fasli, unless the condition relied upon by the

appellant was by force of established general custom or positive law made a part of the contract of tenancy. The condition being, it seems to me, not so incompatible with a tenancy from year to year as to be on that ground inadmissible, might have been made an available defence to the suit by proof of established custom supporting it. But the existence of such a custom has not been even asserted in the case, and the whole argument on behalf of the appellant has been directed to show that his tenancy was made indefeasible, as long as he paid the rent stated in the agreement, by the law enacted in Regulation XXX of 1802, read with Regulation V of 1822, and Madras Act VIII of 1865.

1871. *May* 1. *S. A. No.* 9 *of* 1870.

First as to the Regulations—I cannot concur in the decisions in the cases of *Enamandaram Venkayya* v. *Venkatanáráyuna Reddi,* and *Nallatambi Pattar* v. *Chinnadeyvanáyagam Pillai,* 1 M. H. C. Reps. 75 and 109; that those Regulations and the others passed in 1802, relating to the rights and liabilities of landlords and farmers of land and their tenants in regard to the recovery of rent, apply only to lands which have been permanently settled under Regulation XXV of 1802, for most, if not all their provisions have, it appears to me, been given a general application by Regulation II of 1806 and Act XXXIX of 1858. But in the view I take of the present case, it is not necessary to give a decision on this point, and I do not venture to express any opinion contrary to those decisions without some diffidence. I will merely assume the applicability of the Regulations to the lands in dispute for the purpose of expressing my opinion on the further important point whether they have the effect on the duration of the tenancy contended for by the appellant.

After carefully considering the combined effect of all the Regulations, I have come to the conclusion that they do not provide in any way for the duration of a tenancy beyond the end of the term for which it was created by the express or implied contract of the parties, whether the tenancy be for a year or a longer term. They are not, as Regulation IV of 1822 declares, to be read as defining, limiting, or infringing the rights of any landholders or tenants, but as

1871. May 1. E. A. No. 9 of 1870.

merely providing certain modes by which the payment of rents might be enforced. And the only restraint on eviction that I can find is that imposed by Regulation XXX of 1802, Section 10, and Regulation V of 1822, Section 8, and it relates to eviction on the refusal of a tenant to exchange a muchalka for a pattah during the currency of a fasli term. I am, consequently, of opinion that the Regulations relied upon did not give the appellant the right to a continuance of his tenancy as long as he paid the amount of rent at first agreed upon.

Then as to Madras Act VIII of 1865—its enactments are substituted for the provisions in the Regulations relating to the rights and liabilities of landlords and tenants in respect to the recovery of rent, which are repealed by it; and there can be no doubt, I apprehend, that they are applicable to holdings of both temporarily and permanently settled lands. But they do not, I think, afford any support to the appellant's contention. There is no provision in the Act, it appears to me, which qualifies the right of eviction on the termination of a tenancy for a year or a longer period. The purpose and intent in passing the Act was to consolidate and amend the law relating to the recovery of rent as provided in the Regulations, and the enactments do no more than give effect to that intention. They relate either to the making of contracts of tenancy, or the recovery of rent under them. And where the termination of a tenancy by ejectment is provided for, as is done by Sections 12, 41 and 44, it is only as a summary mode of redress for the refusal of a tenant to exchange a muchalka for a pattah, and when rent remains in arrear after the fasli has ended. Further, it is expressly shown by Sections 12 and 44 that the duration of a tenancy is still a matter left for determination in a regular suit by the application of the general law to the agreement of the parties in each case, subject, however, to the restriction in Section 44 requiring the suit in the case of a summary eviction after the end of a fasli to be brought within the period of one month from the time of the eviction.

Upon the grounds, therefore, that neither the Act nor the Regulations operate to extend a tenancy beyond the

period of its duration secured by the express or implied terms of the contract creating it, and that, by the express contract under which the defendant held, he was only a yearly tenant, I hold that the plaintiff had a perfect right to eject him at the end of a fasli. The judgment in the case of *Venkataramanier* v. *Ananda Chetty*, V. M. H. C. Reps. 122, in which I took part, has gone too far in laying down the rule as to a pattahdár's right of occupation in the broad terms that it does.

1871. *May* 1. *S. A. No.* 9 *of* 1870.

This conclusion renders it unnecessary for me to say anything in the present suit as to the demand of an increased rent and the refusal to agree to it. Having the right of eviction on the termination of the term of the tenancy, it is immaterial what induced the plaintiff to enforce the right. But I may add that had the claim in the suit been to eject before the end of a fasli into which the tenancy had by mutual consent been continued, it must, in the view that I take of the effect of the agreement, have been dismissed, for such demand and refusal would not have given the plaintiff a right to determine the current tenancy. He has not thereby been even placed in a position to recover the increased rent.

I think the decree of the Lower Appellate Court should be affirmed, and the appeal dismissed, but without costs.

HOLLOWAY, J.—The question in this case is whether the defendant has a right to hold for ever at a fixed rate of assessment. The tenancy commenced under an agreement of defendant's father with the Collector, dated the 14th August 1837, during the period at which the pagoda was under his management. On the restoration of the management a certain document was taken from the manager, of which paras. 6 and 7 were alleged in support of the claim to hold for ever at a fixed rate. Assuming that the terms of document A would be binding for ever upon all successive managers of the pagoda, a very doubtful proposition, it is manifest that it contains nothing in support of this claim to hold for ever at a fixed rent. On the contrary it expressly provides for its increase according to the extent of land to be cultivated, the character of the produce raised and the irrigational benefits enjoyed.

1871. May 1. S. A. No. 9 of 1870.

It was scarcely contended that, on the proper construction of the terms of the document, any such permanent tenancy could be inferred, and the case was put upon the broad proposition that by the Regulations of which Act VIII of 1865 (Madras) purports to be a consolidation, a tenant once let in has the right of holding for ever so long as he pays the rent. It was scarcely said whether this was the rent originally agreed upon, or the mproved rent which the fall in the value of money, quite irrespectively of other considerations, would make the equivalent of the money-rent originally demanded. This is, in the present case, of importance, because the defendant distinctly refuses to pay a larger rent in any circumstances. It is also to be noticed that he is found to have failed to perform the services for which he stipulated.

Looking at Act VIII of 1865, I can find nothing to support the doctrine that a lessor can never terminate his agreement with a lessee. I am unable to find that the Act, or those which it repealed, have dealt, or have intended to deal in any way with this important question. I seem to find distinct evidence that they have not done so. Regulation IV of 1822 is a legislative interpretation of the Acts which the Madras Act consolidates. Section II. "It is hereby "declared that the provisions of Regulations XXV, XXVIII, "and XXX of 1802, were not meant to define, limit, infringe "or destroy the actual rights of any description of land-"holders or tenants; but merely to point out in what manner "tenants might be proceeded against, in the event of their not "paying the rents justly due from them, leaving them to re-"cover their rights, if infringed, with full costs and damages, "in the established Courts of Justice."

This section declares two things of the utmost importance. All the Regulations on the subject left the right of land-holders and tenants as they were before they were passed. No inference is to be drawn from them as to such rights, because such inference is declared by legislative interpretation to be beyond their purview. The decisions under them, even as to the matters to which they do relate, are merely provisional, and may be set at nought in the

regular Courts of Justice, although what remedy tenants could have if they had only been made to pay what is justly due, it would be difficult to say. The unhappiness of the language does not, however, prevent the meaning from being perfectly clear, they were intended to govern the summary procedure of Collectors as to the collection of arrears of rent, and their decisions, even upon this narrow matter, were merely provisional.

Act VIII of 1865 professes to be an Act for improving and consolidating the laws of which this is the scope, and it would certainly require language of extraordinary cogency to extend its provisions to matters not embraced, and distinctly declared not to be embraced, by the Regulations which it professed to consolidate and improve. Is there any such language? Section 12 seems to repeat the enactment as to the provisional character of the remedy, and assumes that a Civil Court may eject tenants on grounds wholly beyond the scope of this Act. The latter part of the section, too, would be strongly opposed to the construction that the tenancy having once commenced must be permitted to go on, subject to the power of revising the pattah and adjusting the rent, which is given by the Act. It would be curious if one of the contracting parties could put an end to the tenancy at the close of the revenue year, and the other never. It is comprehensible on the hypothesis that there is another somewhat more cumbrous mode of putting the lessor upon equal terms, and to that mode the lessor seems unquestionably referred by the earlier part of the section. The language, moreover, points to other grounds than those on which the tenant may be ejected by the Collector under the Act. Section 44 again shows the provisional character of the remedy. Section 87 again points to a concurrent remedy in the Civil Courts, and the section is important, because it expressly binds the Courts to determine the rates according to the provisions of this Act, and is the only limitation upon their powers contained in it. I am satisfied that the provisions of this Act do not in the least relate to the duration of the right of holding, except in the single case of forbidding summary proceedings in the case of a tenant who has surrendered at the close of the revenue

1871. May 1. S. A. No. 9 of 1870.

year. I regard it as perfectly clear that there is nothing in these Acts to settle, so as to bind the Courts of law, the duration of a lessee's tenancy. Whatever law, statute or customary, or the contract of the parties makes it, such it continues to be after the enactment of all these Regulations. That having converted farmers of taxes into country-gentlemen, the Legislature might well have determined the limits within which these rights were to be exercised, as against the holders of the soil, is undoubted. That they reserved that power on the transformation, the Bengal Regulations show. That it is perfectly open to the Legislature of any country and of any time to protect tenants against the unreasonable exercise of the so-called rights of property, only called especially sacred because the possessors of it make the laws, I entertain no doubt. The question here is whether these Acts have done it, and on their own express declaration. I have no doubt that they have not. If they had, it would not have been necessary in Bengal, possessing Regulations upon which these Madras ones were framed, to declare in the year 1859 that a right of occupancy, such as the defendant here asserts, should arise on a holding of a particular character for a particular time.

In the present case I find that, whether the express contract was binding on the pagoda or not, it gave no right to hold permanently, and that there is nothing in any existing written law to render a tenancy once created only modifiable by a revision of rent, but not terminable at the will of the lessor exercised in accordance with his obligations.

I am of opinion that the judgment of the Lower Court should be confirmed.

Appeal dismissed without costs.

Appellate Jurisdiction. (a)

Regular Appeal No. 114 *of* 1869.

MRS. JESSIE FOULKES.................. *Appellant.*
S. RA'JAHRATHNA MUDALI............ *Respondent.*

Suit to recover the proprietary right in a village belonging to plaintiff's muttah, which was let to defendant's father under a pattah and muchalka, and which, on the death of her father, and since, the defendant refused to surrender upon the grounds (1) that the right had been leased permanently, subject to the regular payment of the stipulated rent, which condition had been strictly fulfilled; (2) that her father had expended large sums in making substantial permanent improvements in the village; and (3) that he had by gift transferred the tenancy to her.

Held, that on the true construction of the terms of the pattah and muchalka only a tenancy from fasli to fasli was created.

Neither Regulation XXX of 1802 nor Madras Act VIII of 1865 operate to make a tenancy, established by ordinary pattah and muchalka, of a permanent nature by attaching to it the condition that it should be indeterminable as long as the stipulated rent was paid.

Special Appeal No. 9 *of* 1870 [ante, page 164] followed.

1870. *July* 4. 1871. *May* 1. *R. A. No.* 114 *of* 1869.

THIS was a Regular Appeal against the Decree of E. F. Eliott, the Civil Judge of Salem, in Original Suit No. 4 of 1869.

The suit was brought to recover possession from the defendant of the village of Tadamputti appertaining to the muttah of Kunnankurchy, with arrears of produce of the said village.

The plaint alleged that the village in question was leased out with possession to Mr. G. Fischer, the father of the defendant, by the ancestors of plaintiff, on an annual rental of Rupees 1,478 under a lease-deed, dated 30th March 1846, and a pattah and muchalka duly exchanged between the respective parties in accordance therewith, and that Mr. Fischer continued to be in the enjoyment and possession of the same village on the payment of the aforesaid yearly rental up till the date of his demise in August 1867, when the defendant usurped possession of the village and collected the rents from the ryots. The plaintiff, therefore, preferred this suit to recover possession together with arrears of produce since the date of the demise of the late Mr. Fischer, the original lessee.

The defendant denied the plaintiff's right to recover the village or to eject her from the same, and claimed the same

(a) Present :—Scotland, C. J. and Holloway, J.

1870. July 4. R. A. No. 114 of 1869.

under a deed of gift duly executed to her, shortly before his demise, by her father the late Mr. Fischer, the original lessee, assigning and making over to her all his right, title, and interest in the said village, which (as stated in the said deed of gift) he (Mr. Fischer) had obtained on "permanent lease"—she further stated that she ever since continued to possess and enjoy the said village, and made no default in payment of the fixed rent of the village, but that the plaintiff, with a view to unjustly obtain possession from her thereof, refused to receive the kist amounts when tendered to him by defendant's people according to the terms of the pattah granted to her father, which she affirmed to be a pattah conferring a permanent right to hold the village in question, and containing no clause or condition limiting her father's or her right of enjoyment.

The following is a translation, in part, of the lease, exhibit A:—

"Lease muchalka executed by Mr. G. F. Fischer......... to Arumuga Mudali and Shunmuga Mudali.........

As I have obtained from you the village of Tadamputti attached to the said Kanudukurichi mutta under lease for an annual rent of Rupees 1,478, I myself shall hold under my enjoyment the Turapaddy lands, immemorial waste and all other poramboke lands.........and pay the above fixed rent, Rupees 1,478, every year, on the 30th of each month, according to the instalments fixed, commencing in the next year Parabava (1846) or fasli 1256, and obtain receipts for the same. In case of failure to make such payments I shall be bound to pay the amount with interest calculated from the date of expiration of each instalment up to the end of that fasli; and if I do not do so, I shall put you in possession of the said leased village in the beginning of the following year. I shall also be deprived of the benefit of the repair of the tank, bank, etc., if I had done any in the said village.........I shall continue the payment of the said rent notwithstanding any impediment occasioned by the excessive rain or from want of the same."

The Civil Judge held that the lease-deed in question, exhibit A, was not of the nature of a "permanent lease" as

contended by defendant, inasmuch as it contained no clause or condition to that effect, or in any way as regards "perpetuity" or insuring to the tenant a more stable hold upon the land, but, on the contrary, was expressedly an ordinary annual rental to the original lessee, Mr. G. Fischer, for the term of his life-time alone, and was inoperative after his death, after which the possession of the village reverted to the plaintiff; and as such, that it was a lease at will and that the defendant was not entitled to the enjoyment and possession of the said village. He, accordingly, decreed for the plaintiff as sued for with costs, leaving the question of mesne profits to be determined at the time of the execution of the decree.

The defendant appealed on the grounds, amongst others, that the lease did not create a tenancy at will, and that the tenancy was permanent, subject only to the condition of punctual payment of rent.

The *Advocate General* for the appellant, the defendant.

Mayne for the respondent, the plaintiff.

The Court delivered the following judgments—

1871. May 1.

SCOTLAND, C. J.—This appeal arises out of a suit to recover the proprietary right in a village belonging to the plaintiff's muttah, which was let to the defendant's father under a pattah and muchalka executed on the 30th March 1846; and which, on the death of her father in August 1867, just after the end of the Fasli, and since, the defendant had refused to surrender upon the grounds (pleaded in the suit) (1) that the right had been leased permanently, subject to the regular payment of the stipulated rent, which condition had been strictly fulfilled; (2) that her father had expended large sums in making substantial permanent improvements in the village, and (3) that he had by gift transferred the tenancy to her. The plaintiff also sued for mesne profits from the death of the defendant's father. In the Court below there was no dispute as to the due payment of the rent by the defendant's father and the tender and refusal of it as it became payable since his death; and to establish the alleged permanency of tenure, the terms of the pattah and muchalka appear to have been alone relied upon. In the

1871. May 1. R. A. No. 114 of 1869.

defendant's written statement it is also rested upon the custom of the country, but no attempt has been made to prove such a custom. The Court below decided that the pattah and muchalka created an ordinary yearly tenancy, which the defendant had no right to the continuance of, and decreed the surrender of the proprietary right to the plaintiff, reserving the claim to mesne profits for consideration in executing the decree.

The questions raised and argued in the appeal are, whether the Court below has rightly construed the contract of tenancy as evidenced by the pattah and muchalka, and whether, if in terms it created a fasli tenancy only, Regulation XXX of 1802 and Madras Act VIII of 1865 did not operate to make every such tenancy one of a permanent nature, by attaching to it the condition that it should be indeterminable as long as the stipulated rent continued to be duly paid.

As to the first question, I am clearly of opinion that, by the terms of the pattah and muchalka, only a tenancy from fasli to fasli was created. I think that they evidence substantially the same contract and understanding as the agreement in *Special Appeal No.* 9 *of* 1870, in which I have just expressed my judgment.(a)

The second question I have fully observed upon in the same judgment, and, for the reasons there given, I am of opinion that neither the Regulation nor the Act operated to extend the duration of the tenancy beyond the term provided for by the contract creating it. It does not appear to me to make any material difference, as respects this 2nd question, that the tenant in the present case was a middleman between the muttahdar and the cultivators of the village.

With respect to the decision in the case of *Freeman* v. *Fairlie*, 1 Moo. I. A. 305, which was not cited in *Special Appeal No.* 9 *of* 1870, it is enough to say that it does not, I think, give any support to the contention of the appellant. Both it and the decision in *Baboo Dhunput Singh* v. *Gooman Singh and others*, 11 Moo. I. A. 433, show that a

(a) See page 167.

1871. May 1. R. A. No. 114 of 1869.

right in property for which a pattah has been granted may, by other evidence, be proved to be a permanent right, although the pattah contains no words importing permanency, but in the present case no evidence tending to show that is forthcoming. Then as to the improvements alleged to have been made by the defendant's father, it is quite in accordance with the terms of the contract of tenancy that the defendant should receive from the plaintiff a just proportion of the amount which has been expended in making permanent improvements, by which the value of the village to the plaintiff has been increased.

I am of opinion, therefore, that the decree of the Court below should be affirmed, but without costs, and the plaintiff ordered to pay the amount which the Court below may find, upon an account taken for that purpose in execution of the decree, to be justly due on account of such unexhausted improvements.

HOLLOWAY, J.—I am of opinion that, on the plain construction of the document evidencing the lease, the tenancy granted was one from year to year even to Fischer. It is still more manifest that there is nothing to bind the lessor to Fischer's heirs or assignees. The terms of native conveyances, when they purport to convey permanent rights, are peculiarly emphatic, and it would be exceedingly difficult to construe any document not containing one of them as conveying a right to hold permanently.

With respect to the doctrine that a tenancy once created is rendered permanent by the law itself, I have given my reasons for considering this doctrine to have no foundation in my judgment in *Special Appeal No.* 9 *of* 1870.(a)

I think that there should be an inquiry as to the permanent improvements made, for which the lessee should be reimbursed, for the language of the contract implies that unless there was a failure to pay rent these should be restored.

I lay no stress upon the absence of words of inheritance, and I see no reason why Fischer's heirs or assignees should not have the benefit of the provision.

(a) See page 171.

1871.
May 1.
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of 1869.

As to *Freeman* v. *Fairlie*, much referred to in the argument, it seems to me to have no bearing upon the question, or perhaps bears the other way. The judgment of the Lord Chancellor shows that the estate of which the pattah was evidence was considered to have arisen under the Regulations of 1793, and the rent received by the pattah was considered rather to show that the estate was not of inheritance, but, on the explanation that the sum received was tax rather than rent, the estate was held freehold. The holding under the pattah did not make it so, but it was held to be so despite language apparently showing a holding as a mere tenant from year to year.

Appeal dismissed without costs.

Appellate Jurisdiction. (a)

Regular Appeal No. 108 *of* 1870.

The MADRAS RAILWAY COMPANY......... ...*Appellants.*
The ZAMINDA'R of KA'VATINAGGUR... ... ...*Respondent.*

Suit for damages sustained by plaintiffs by reason of injuries caused to a line of Railway, the property of plaintiffs, by the bursting of defendant's tanks. Negligence, on the part of the defendant, was not alleged in the plaint. Upon the findings—(1) That the tanks were existent before living memory. (2) That they were breached by an extraordinary flood. (3) That they were tanks constructed in the ordinary manner with escapements sufficient for all ordinary floods and such as are universally employed. (4) That they were absolutely necessary to human existence, so far as it depends upon agriculture. (5) That the Railway was constructed with a full knowledge of their existence.—*Held*, that the suit was rightly dismissed.

Rylands v. *Fletcher* (L. R. 3 H. L. 330) discussed.

1871.
February 15.
R. A. No. 108
of 1870.

THIS was a regular appeal against the decree of C. G. Plumer, the Acting Civil Judge of Chittúr, in Original Suit No. 17 of 1868.

The suit was brought in 1868 to recover payment from the defendant of the sum of Rupees 45,000, being the amount of damage sustained and incurred by plaintiffs by reason of injuries done in 1865 and 1866 to a line of Railway and to the works connected therewith, the property of plaintiffs, by the escape of water collected and kept by defendant on his land. At the first hearing the Civil Judge (E. F. Elliott)

(a) Present :—Holloway, Acting, C. J. and Innes, J.

dismissed the suit on the ground that the plaint did not disclose a cause of action. The plaintiffs appealed against this decision in R. A. No. 30 of 1869, and the High Court, holding that the case stated in the plaint called for an answer on the part of the defendant, remanded the suit for trial upon the merits. [See Vol. V. of these Reports, p. 139, where the plaint will be found set out.]

The suit came on again for settlement of issues on the 1st July 1870.

The written statement of the defendant alleged that the plaint did not disclose any sufficient cause of action; that the injuries complained of were not attributable to any default of his; that if the injuries complained of did take place, they were not the result of any influences subject to his control, but rather the consequence of *vis major* or the act of God; that the tanks referred to in the plaint existed from time immemorial and were requisite and absolutely necessary for the cultivation and enjoyment of the land, which could not be otherwise irrigated; that the practice of storing water in such tanks in India, and particularly in this district and in the zamindárí of Kávatinagarum and the adjacent districts is lawful and is sanctioned by usage and custom; that the said zamindárí is a hilly district, and the ryots would be unable to carry on their cultivation without such tanks, they being the chief source of irrigation, and that the omission to store quantities of water in such tanks would be attended with consequences dreadful to the inhabitants of the country: that the plaintiffs' railway is a modern construction, and that if the injuries complained of be held to have taken place they were the result of plaintiffs' own neglect and default in the construction of channels alongside of their line of railway which overflowed their banks and in not providing, as they were bound to do, proper and sufficient waterway for the escape of water, and in not constructing proper abutments, piers, embankments and other works connected with their railway: that the plaintiffs did not take proper care to prevent the occurrence of the thing complained of, and they must be held to have taken upon themselves the risk of damage happening; that defendant could not have avoided collecting a quantity of water in the tanks during the monsoon, and that he had not

1871. February 15. R. A. No. 108 of 1870.

failed to use all reasonable care: that there were several tanks and channels above his tanks belonging to Government and other people which also burst at the same time; that under these circumstances the plaintiffs were not entitled to any damages.

The Civil Judge found that the plaintiffs had undoubtedly sustained damage by the bursting of the defendant's tanks. That such injury was not the result of default or neglect of the plaintiffs: but that the defendant was not liable for the loss sustained by the plaintiffs as he had used reasonable and proper precautions to guard against all ordinary accidents. That the bursting of the tanks in question was an extraordinary accident, and that the defendant was not bound to provide against such. The suit was, accordingly, dismissed with costs.

The plaintiffs appealed.

The *Advocate General* and *Mayne*, for the appellants, the plaintiffs.

Miller, Rama Ráu and *Subramányam Ayyár*, for the respondent, the defendant.

The Court delivered the following judgments:—

HOLLOWAY, Acting C. J.—This case was very little argued. It was pretty clearly intimated to us that the attempt is to be made by an appeal to Her Majesty in Council to apply the doctrine of storing water contained in *Fletcher* v. *Rylands*(a) to landholders in this country. The case was framed with that view, the refusal to allege negligence and the former appeal, because the plaint had been rejected for not alleging it, show this. It was not attempted to impeach the conclusions of the Civil Judge upon the evidence, and the question of negligence of construction does not really arise. These conclusions are:—

1. That the tanks were existent beyond living memory.
2. That they were breached by an extraordinary flood.
3. That they were tanks constructed in the ordinary manner with escapements sufficient for all ordinary floods, and are such as are universally employed.

(a) L. R. 1 Ex. 265; L. R. 3 H. L. 330.

4. That these tanks are absolutely necessary to human existence, so far as it depends upon agriculture.

5. And, if there is anything in the point, that the railway was constructed with a full knowledge of their existence. If it had been a case of nuisance there would have been a coming to the nuisance.

If the Court on the first hearing of the case had intended to apply the doctrine of *Fletcher* v. *Rylands*, nothing would have remained but to assess the damages, and this was manifestly not the intention. Coming to the case, therefore, for the first time, I feel at full liberty to consider and decide upon the whole matter involved.

A rule of English law is not a rule for us, unless it is a correct rule, and it is quite possible that a rule excellent there may be wholly inapplicable here. It is impossible not to agree with Baron Bramwell that it is important to ascertain the principle on which a case should be decided, and in every case in which it is a question of a right, the nature of that right and its grounds of origin demand careful scrutiny. When a law made up by cases determines that there is in a particular case a liability, it in fact decides that there has been an infraction of right. When the House of Lords and the Exchequer Chamber in the present case decided that there was a liability to compensate, they, in fact, decided that a man has a right to store water only when he has taken complete precautions against its escape; that the escape is irrebuttable evidence of the culpable hurting of the right of another, of the commission of an injury, and that he is bound to compensate for the damage caused. The rights of demand, which we are here discussing, are in English law called torts; and by modern writers on Roman law they are commonly termed obligations arising from unpermitted acts. It has been objected to this classification that all independent rights of demand are to be included in this group which have for their object the preserving unimpaired the jural condition of a person and restoring it where it has been injured without legal ground, and indifferently, in the first place, whether the hurtful act was an unpermitted one or not. (Förster, *Preuss. Priv. R.* 523.) The point to which the attention of

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this eminent practical lawyer is here directed is the fact that an act apparently innocent, and not, therefore, unpermitted, becomes the basis of the claim when damage actually results. The English case is an example of this. The truth, however, is that the act is decided to be an unpermitted one when it creates the damage, and this not because damage without injury is or can be a cause of action, but because the right of the neighbour is not a right to prevent the building of a reservoir, but a right to prevent his mine from being invaded by water artificially collected. The right is not one to collect any water at his pleasure, but only such as he can restrain within his own bounds. When he fails to restrain it (this being the compass of his right), he exceeds that right, infringes the right of his neighbour and commits an injury. In the present case in the House of Lords, the Lord Chancellor says, page 338:—

"My Lords, the principles on which this case must be "determined appear to me to be extremely simple. The de-"fendants, treating them as the owners or occupiers of the "close on which the reservoir was constructed, might law-"fully have used that close for any purpose for which it "might in the ordinary course of the enjoyment of land be "used; and if, in what I may term the natural user of that "land, there had been any accumulation of water, either on "the surface or underground, and if, by the operation of the "laws of nature, that accumulation of water had passed off "into the close occupied by the plaintiff, the plaintiff could "not have complained that that result had taken place. If "he had desired to guard himself against it, it would have "lain upon him to have done so, by leaving, or by interpos-"ing, some barrier between his close and the close of the de-"fendants in order to have prevented that operation of the "laws of nature."

The test here proposed is whether the accumulation took place in the course of the natural user of the close. Now it is very obvious that the most natural user of land is for the purposes of agriculture, and that in England, until the summer of 1868, it never entered into the head of any Englishman that the storing up of large quantities of water could be essential to agriculture. How does the case stand here? Such

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storing is absolutely essential to the simple agriculture of the people. This cannot be put more forcibly or more truly than it has been put by the Civil Judge. Laws, older than the Muhammadan domination, as old as authentic history, have recognized the primary necessity of such tanks and declared the destruction of them the greatest of crimes, and for the obvious reason that they are the well spring of a people's life. Surely the storing up of water is no mere artificial user of Indian land, but the only possible mode of natural user. Looking, therefore, at the principle of this case and not merely at its form, I am clearly of opinion that there is no right to compensation simply because of damage from an escape. The rule upon which the relative rights of men are to be determined is no mere unbending formula. The existence of men in society requires that each should sacrifice a portion of his abstract rights to permit of the co-existence of others. This has, of course, been constantly recognized. In this, as in so many other cases, the formal rule of law is to be drawn from the matter of which it is the regulating principle. In *Tipping* v. *St. Helen's Smelting Co.*(a) (at p. 650, 11 H. L. C.) the necessities of commerce are admitted as a ground for compelling persons in a populous town to put up with poisonous vapours, although the superior sanctity of property, always in England better considered than life or limb, is duly asserted at page 651. In *Cavey* v. *Lidbetter*, 13 C. B. N. S. 476, the Chief Justice points out the influence of time, place and circumstance upon the question of nuisance. In *Bamford* v. *Turnley*, 3 B. & S. 66, all the Judges recognize the doctrine. At the close of the judgment in the Exchequer Chamber in this very case, the necessities of traffic upon the highway, and of trade and commerce, are recognized as grounds for the more limited duty imposed upon carriers and people throwing down packages from wharves. Whether *volenti non fit iniuria* can be regarded as an explanation of the diversity where people are not fed by ravens, and where it is scarcely a matter of choice with a London clerk, or laborer, whether he will go into the St. Katherine's Docks or not, is another question. The true reason of the rule is that although not an immediate, national economy, wealth and prosperity, with all

(a) 11 H. L. C. 642.

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other objects of man's ethical interests, are mediate sources of law. This has had, always will have, and always ought to have an important influence upon the construction of legal propositions. In the present case I say—Agriculture is the oldest of arts. It is still the one of the greatest primary importance. Human life cannot subsist without it, and, despite the Lord Chancellor, human life is more important than property. This art, in the country from which this case comes, is impossible without tanks by which water is to be stored to meet the terrible drought which, in their absence, would wither every blade of grass, destroy the cattle and render future culture impossible. This paramount human interest requires that a certain amount of risk should be incurred by those who, for the purposes of gain or otherwise, resort to a country of which this is the normal condition. They must put up with the inconveniences. They have a perfect right to require that they shall not be injured by the negligence of other people, but they have no right to be secured, at all events, against consequences resulting from the natural user of the land and the changeable character of the climate. To impose such a duty upon a landlord here, because it has been imposed elsewhere upon men who store up matter which may be dangerous and is not necessary, is to disregard the very principle upon which that duty was imposed. These observations are sufficient for the disposal of the only question put in issue against the appellants, and I only remark upon the question of negligence because the Civil Judge has done so. My remarks shall be very few.

As to the sufficiency of the precautions to be used, he will not find the English cases so clear as he seems to have imagined. In *Withers* v. *North Kent R. Co.*,[a] there was a decision to the effect stated. The Regular Reporter, however, has judiciously omitted it, and because he, as well as the Privy Council (1 Moo. P. C. N. S. 101) was unable to reconcile it with one which was decided within three weeks (*Ruck* v. *Williams*, 3 H. & N. 308). The doctrine of normal and abnormal is pushed to an extraordinary length in that case, and the only inference which it seems possible to draw is that Commissioners of sewers are bound to greater foresight than Railway Com-

(a) 27 L. J. (Ex.) 417.

panies. The doctrine of the Privy Council case again, not by any means going to the length of the case in the Exchequer, was disapproved of in *Czech* v. *General Steam Navigation Co.* L. R. 3 C. P. 14-16, where Willes, J. declares that the throwing the burden of proof on the Railway Company, simply on account of the accident, was wrong in the opinion of Erle, C. J. It cannot be said, therefore, that the English doctrine is in a very settled state. It certainly seems that if a passenger injured by a Railway Company is required to prove that there was negligence, that Company being carriers for hire, the rule cannot reasonably be otherwise. Where without any contractual relation a man is to be made liable for *culpa* in the non-performance of the duty "of exercising in his habitual conduct a certain foresight and circumspection, of especially abstaining from operating hurtfully upon the property of others. He who acts in contrariety to this civic duty, without any definite design whatever is found *in culpa.*" Holtzendorff. *Encyclopädie* II. 242. If, therefore, the question of negligence had been in issue, I should consider it not proved. The finding of the Civil Judge on this point was not contested at the bar. For the same reason I do not think it necessary to consider what construction ought to be put upon the passage at the close of the Lord Chancellor's Judgment in *Tipping* v. *St Helen's Smelting Co.*(a) with respect to prescription, or to consider what influence the antiquity of the tanks ought to have upon this question.

My conclusions are, that, on the true understanding of the case of *Fletcher* v. *Rylands*, the Civil Judge's decree is right. That, if otherwise, the imposing of such a duty upon a landowner is forbidden by precisely the same principles as have forbidden the imposition upon Wharfingers, Railway Companies and Shipowners. That this attempt would never have been made if the final decision had rested with Judges conversant with the necessities of the country, and that it has only been made in the hope that such a rule may be imposed elsewhere by Judges not so conversant.

It is my hope and belief that that attempt will not be successful. If it is, I can imagine nothing more calamitous to the Hindu than what is called opening up the resources

(a) 11 H. L. C. 642.

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of the country. Either he must throw his land out of cultivation, or, without proof of any negligence on his side, be compelled to compensate for damages, resulting from natural cultivation, to works centuries in advance of his immediate social necessities and expensive beyond any which these actual necessities would have generated.

I entertain neither doubt nor hesitation in dismissing this appeal with costs.

INNES, J.—This was a suit for damages for destruction of portions of a railway, occasioned by the bursting of certain reservoirs of water belonging to defendant.

The suit was in the first instance dismissed by the Civil Judge, on the ground that there was no cause of action, as there had been no allegation of negligence.

On appeal the suit was remanded, Mr. Justice Bittleston and I, before whom the appeal came, being of opinion that, on the case stated, which was not denied by the defendant, there was a cause of action set out, as reservoirs of water are liable to burst and do mischief, and, according to the rule laid down in *Fletcher* v. *Rylands*, the keeping of what is likely if it escapes to prove dangerous to others is at the peril of the keeper, subject of course to certain defences which it is open to him to set up according to the circumstances. The Civil Judge has now, after trial, dismissed plaintiff's suit on the ground that the tanks which burst are tanks used for purposes of irrigation, that they are necessary for the existence of the surrounding population; that the defendant is not bound at his peril to keep the water in; that the duty cast upon him was only to use reasonable care; that he did use reasonable care sufficient for all ordinary occasions; and that the tanks burst by reason of a extraordinary fall of rain, such as had not been known for several years, and against which defendant could not be expected to provide. In appeal the point taken is that a person in the position of defendant in respect of these tanks, is an insurer, and is bound to prevent or answer for the damages arising from the escape of the water.

If a man causes injury to another and damage follows, he is answerable for the act from which the injury has arisen, if he could have avoided it.

About the damage in this case there is no question. Then was there injury? Was there, by any avoidable act or omission of defendant, a breach of an obligation due to the plaintiffs? 1871. February 15. R. A. No. 108 of 1870.

What is the obligation of defendant as to keeping these tanks from bursting and causing mischief? The tanks are ancient. They are maintained, as they have been immemorially used, for the purposes of irrigation according to a system in use throughout this part of India. The State is the general landlord, but in some parts of the country it has made over certain of its rights as landlord to zamindárs like the defendant, who thus become vested with the duties of management which previously appertained to the State. One of the duties which the State has always recognized as appertaining to itself is the maintenance of old and the extension, wherever practicable, of new works of irrigation. The reason is obvious. Where works of irrigation are in existence, a population gradually gathers in the neighbourhood, and land is taken up and brought under cultivation on the faith of the works being maintained. Water brings with it abundance in good seasons and enables provision to be made against seasons of scarcity. If the maintenance of these works is abandoned, the population dwindles with the diminution of the means of subsistence, becomes impoverished, and finally disappears. The State also suffers in the loss of revenue which follows the diminution of abundance. When, therefore, irrigation works have been constituted and maintained and proved conducive to the increase of population and wealth, it seems obvious that their maintenance ought to be continued; and that the State, in recognizing its duty to maintain them, has acted upon the view that their maintenance is necessary to the prosperity and advancement of the country. The tanks of this defendant are in the same position, in this respect, as the other works under the direct management of the State. Now, it appears to me that, in this country, that which the State has, in the interests of the community, taken upon it to maintain, it has impressed with the character of lawfulness, and although the maintenance of it may be, in some particular circumstances, dangerous to the interests of private persons, it is, by the character which the

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State, acting for the community, has impressed upon it, removed from the class of dangerous and noxious things which a man brings and keeps at his peril, "whether" (as expressed by Blackburn, J. in *Fletcher* v. *Rylands* L. R. 1 Ex. 280) "the things so brought be beasts, or water, or filth, or stenches," and is properly placed on a footing with the class of dangerous trades and occupations in England for which there is legislative sanction. In such cases what is authorized to be done must be done in a careful manner. This is the whole obligation. In other words, negligence causing damage gives a cause of action, but unless there be negligence there is no action for damage caused by acts within the scope of the express, or necessarily implied authority conferred by the law. See *Jones* v. *Festiniog R. Co.* 37. L. J. Q. B. 214, (in which *Vaughan* v. *the Taff Vale R. Co.* is quoted) and the recent case of *Smith* v. *London S. Western R. Co.* reported in 40 L. J. C. P., 21, decided in the Exchequer Chamber. Now it is conceded that in this case the defendant had so maintained the tanks up to the date of the damage occurring, that for 20 years they had not burst, and the evidence shows that, but for the extraordinary rainfall, there was no reason for apprehension. They were of the ordinary construction of most of the Government tanks, but it is conceded that some tanks have stone weirs which offer greater security for the gradual escape of an unusual influx of water than those of these tanks. But I agree with the Judge that defendant was not bound to avail himself of the last results of science, and that there was no want on his part of proper care and precaution.

For the reasons just given, I think that the nature of these tanks, as shown in the defence, is such as to exempt defendant from responsibility for damage caused in the maintenance of them, unless there has been negligence on his part giving occasion to the damage. There has clearly been no negligence, and I agree in dismissing this appeal with costs.

Appeal dismissed.

Appellate Jurisdiction (a)

Criminal Regular Appeal No. 116 *of* 1871.

Ex-parte MAHALINGAIYAN.

A Civil Court has no power to make an order, under Section 170 of the Criminal Procedure Code, sanctioning a prosecution for an offence committed before the Court of the Principal Sadr Amín on the Small Cause Side, that Court not being subordinate to the Civil Court.

THIS was a petition against the sentence of the Court of Session of Salem, in Case No. 23 of the Calendar for 1871.

1871. *May* 3. *C. R. A. No.* 116 *of* 1871.

Sloan for the appellant, the prisoner.

The facts of the case and the arguments of counsel are fully stated in the following

JUDGMENT:—The appellant in this case has been convicted, under Sections 463, 467 and 471 of the Penal Code, of the offences of forging a document purporting to be a bond for Rupees 100, executed by the 1st witness for the prosecution, and fraudulently using the said bond, and it is objected, in the appeal against the validity of the conviction, that the order of the Civil Court of Salem sanctioning the prosecution was insufficient to give jurisdiction to entertain the charges.

The material facts are, that the document was given in evidence in a suit brought upon it on the Small Cause Side of the Principal Sadr Amín's Court of Salem, and that Court considered it to be a forgery and dismissed the suit. Not long afterwards the Principal Sadr Amín's Court was abolished, and the defendant then addressed his petition for leave to institute Criminal Proceedings against the appellant for the forgery to the Civil Court of Salem, and thereupon the order in question was made.

Mr. Sloan, for the appellant, contends that the Principal Sadr Amín exercising Small Cause jurisdiction was not a Court subordinate to the Civil Court, and if this contention is right, the order in question was undoubtedly ineffectual, and the Criminal Proceedings against the appellant are *ab initio* nugatory; for Section 170 of the Code of Criminal Procedure enacts that such charges "shall not be entertained in any Criminal Court, except with the sanction of "the Court in which the document was given in evidence, or "of some Court to which such Court is subordinate."

(a) Present:—Scotland, C. J. and Kindersley, J.

1871. May 3. C. R. A. No. 116 of 1871.

We are of opinion that the objection is a good one. The term 'subordinate' in that Section was intended, we think, to be understood in the sense of subjection to the jurisdiction or control, and in the exercise of the jurisdiction and powers provided for by the Small Causes Courts' Act, No. XI of 1865, those Courts are not in any way made subject to the jurisdiction or control of the Civil Courts. The only existing Court to which they are in this sense subordinate is the High Court (see Sections 46 and 53). Then, does it make any difference in this case that the officer who disposed of the suit in the exercise of Small Cause jurisdiction was subordinate to the Civil Court in his judicial capacity of Principal Sadr Amín? We think not. A distinct appointment was necessary to empower him to exercise such jurisdiction, and, when he acted judicially by virtue of that appointment, he did so, in our opinion, for all purposes and in every respect as a Judge of a Court of Small Causes, quite independently of his functions as a Principal Sadr Amín.

This view of the position of Judges of Courts of Small Causes, with reference to the Civil Courts, has been several times recognized and acted upon in Proceedings of this Court, and the recent decision in the case of *Náráyana Malya* v. *Govind Shetty*, 6 M. H. C. Reps. 18, bears directly in support of it.

We are, consequently, of opinion that the objection is fatal to the conviction and sentence, and that they must be annulled and the prisoner set at liberty.

Appellate Jurisdiction. (a)

Referred Case No. 70 *of* 1870.

CHENGULVA RA'YA MUDALI

against

THANGATCHI AMMA'L and others.

An action lies in a Small Cause Court for the recovery of costs incurred by the plaintiff in a suit to compel registration of a document.

1871. May 15. R. C. No. 70 of 1870.

THIS was a case referred for the opinion of the High Court by S. Narasimhulu Náyudu, the District Munsif of Chingleput, in Suit No. 181 of 1870.

(a) Present :—Scotland, C. J., Holloway and Kindersley, J. J.

1871. May 15. R. C. No. 70 of 1870.

Plaintiff sued to recover the amount of costs incurred by him in compelling registration of a document executed to him by defendants, the Court which compelled the registration having refused to grant costs. The District Munsif was of opinion that the suit would not lie, but he referred the question,—"Whether a suit for the recovery of costs, incurred by a party in the course of obtaining the registration of a document, against the person who executed it, but who refused to get it registered, can be entertained in a Small Causes Court, when the District Court has not allowed the said costs?"

No counsel were instructed.

The Court delivered the following judgments.

HOLLOWAY, J.—The question is whether the plaintiff can recover in the Small Causes Court the costs incurred in compelling registration. The general rule is that costs, where adjudicable upon, are not an element in calculating damages.

Under the Registration Act it has several times been decided that costs cannot be given, and in the present case they were not given.

It seems, therefore, that if the transaction between the parties imported an obligation to get the document registered, and, through refusal to perform it, the plaintiff was put to the costs in the suit rendered necessary by defendants' breach, those costs are recoverable in the Small Causes Court.

KINDERSLEY, J.—I am inclined to concur in this opinion. As the Civil Court had no power to make any order for costs, there seems to be no sound objection to the recovery of costs by a separate suit.

SCOTLAND, C. J.—I think that the suit was maintainable. The District Court had no power to grant the costs of the special remedy provided by the Registration Act XX of 1866, and I do not see anything in the Act to preclude the plaintiff, who has been improperly driven to pursue that remedy, seeking to recover the necessary expense to which he has been put.

The suit then is really one for damages, and assuming the sums claimed to have been reasonably expended in the

1871. May 15. R. C. No. 70 of 1870.

proper conduct of the Proceedings, necessary under the Act, I apprehend the plaintiff is entitled to recover those sums, on the general principle that they are the damages directly and proximately consequent upon a legal injury caused by the conduct of the defendant.

It seems to me that out of the contract to sell and transfer the defendant's title to the property by a *written instrument*, there necessarily arose the implication of the duty to do what on his part was required, in order to effect registration (see Section 36), without which the instrument could not be effectual to pass the title in accordance with the contract.

Upon the ground, therefore, that the defendant's refusal to appear and acknowledge his execution of the instrument, which prevented registration, was a breach of his obligation in that behalf under the contract of sale, and consequently a legal injury to the plaintiff, I give my opinion in the affirmative on the question referred.

Appellate Jurisdiction. (a)

Special Appeal No. 474 of 1870.

WANNATHAN KANDILE CHIRUTHAI. *Special Appellant.*
KEYAKADATH PYDEL KURUP......*Special Respondent.*

Plaintiff sued to recover certain land in virtue of an alleged gift from her deceased husband. The parties were subject to the Marumakkattáyam law. The facts were, that, the land being in the hands of tenants, a deed of gift with the counterpart lease was delivered by the donor to the plaintiff. It did not appear that there were any title-deeds belonging to the property. *Held*, reversing the decision of the Principal Sadr Amín, that the rule of law applicable is that a gift is perfectly valid if such delivery is made as the nature of the object permits, and that this had been done in the present case.

1871. May 19. S. A. No. 474 of 1870.

THIS was a Special Appeal against the decision of K. R. Krishna Ménon, the Principal Sadr Amín of Tellicherry, in Regular Appeal No. 251 of 1869, reversing the decree of the Court of the District Munsif of Badagara in Original Suit No. 268 of 1867.

The suit was brought to recover certain land with arrears of rent. The plaint stated that the land in question

(a) Present:—Holloway and Kindersley, J. J.

1871. May 19. S. A. No. 474 of 1870.

was the jenm of plaintiff's deceased husband, Ponaralam Kutti Kurup; that in Kanny 1033 (1857-8) he demised it on kuyikánam to the second defendant, subject to a certain rent, and obtained a marupátom deed from him; that subsequently, in Kanny 1034, the said P. Kutti Kurup conveyed the jenm right to this land to his wife, the said plaintiff, by deed of gift, and delivered to her the aforesaid marupátom; that the second defendant paid rent to plaintiff up to Kanny 1039; that in Kanny 1039 the said P. Kutti Kurup adopted the first defendant and died the following year; that after the death of the said P. Kutti Kurup, the second defendant at the suggestion of the first defendant refused to pay rent to plaintiff. The defendants denied that any such deed of gift as alleged in the plaint had been executed, and pleaded that even if a deed of gift had been executed to plaintiff by the deceased P. Kutti Kurup, it was invalid, because the plaintiff had not been put in possession of the property.

The Court of First Instance decreed for the plaintiff.

The first defendant appealed.

The judgment of the Appellate Court contained the following:—

"It is admitted on all hands that the subject-matter of the gift was not at its date in the possession of the donor, and that no possession was given to the donee to complete the transaction. It is also conceded that the title-deeds of the lands which the donor then professed to alienate were not given to the donee, and that the land was then in the actual possession of 2nd defendant, who had acquired a kuyikánam right over the land from the donor about one year prior to the alleged gift. This is thus a case in which a person executed a deed of gift in favor of his new wife, conferring upon her the proprietary right to certain lands, of which he was not in possession, but to recover which after some 11 years, subject to the payment of the value of improvements, he had a legal right. Whether under such circumstances the donee has or has not a legal right to recover the lands on the strength of this gift is the sole question for determination, and I am unable to concur in the

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Munsif's opinion upon this question of law. The parties are subject to the Marumakkattáyam law, which is but a branch of the Hindu Law. By this law acceptance and seizin on the part of the donee are as necessary as relinquishment on the part of the donor, and no right is therefore complete without seizin. To constitute a gift, possession must have been conferred, and consequently, the gift, on the strength of which plaintiff seeks to recover the paramba, is wholly invalid, and her suit must therefore be dismissed."

The plaintiff preferred a special appeal on the ground that the deed of gift, exhibit B, was valid.

The *Acting Advocate General* for the Special Appellant, the plaintiff.

Karunákara Ménon for the Special Respondent, the first defendant.

The Court delivered the following

JUDGMENT:—In the present case we are not encumbered with any question of fraud upon the family, for there is no family. The gift was made by the last survivors. In strictness, too, there is no question of Hindu law, for if Malabar law is a branch of Hindu law, it is one put out and separated from the parent stem before the present form of written Hindu law existed. The facts are that a piece of land was in the hands of tenants, that a deed of gift with the counterpart, the badge of the relation of landlord and tenant, was delivered to the plaintiff. As to the non-delivery of title-deeds, it does not appear that there were any, for none are produced. To uphold the decree of the Principal Sadr Amín would, therefore, be to decide that no property outstanding in a tenant can ever be given. We think that the sounder rule, and we are unaware of any principles which should forbid its application to Malabar, is that a gift is perfectly valid if such delivery is made as the nature of the object permits, and we are satisfied that this was done in the present case. We reverse the decree of the Principal Sadr Amín, restore that of the Munsif, and direct that the plaintiff have her costs from the defendants throughout.

Appeal allowed.

Appellate Jurisdiction. (a)

Regular Appeal No. 69 *of* 1869.

(*Civil Mis. Petitions Nos.* 100 & 125 *of* 1870.)

HI'RADA KARIBA'SAPPAH.............. *Appellant.*

GADIGI MUDDAPPA and 2 others...... *Respondents.*

To render an arrangement, come to orally for the payment of the balance of an antecedent debt on a settlement of accounts, available in support of a suit brought after the expiration of the period of limitation applicable to such debt, it must be clearly shown to have amounted to a new valid contract to pay the balance, which extinguished the original cause of action.

Payments unapplied by either the debtor, or the creditor, should be appropriated to the earlier items making up the debt due. This rule is not impaired by the decisions in the cases of *Mills* v. *Fowkes* (5 Bing. N. C. 455) and *Nash* v. *Hodgson* (6 DeG. M. & G. 474).

1871. *May* 17. *R. A. No.* 69 *of* 1869. (*C. M. P. Nos.* 100 & 125 *of* 1870.)

THIS was a Regular Appeal against the Decree of O. B. Irvine, the Acting Civil Judge of Bellary, in Original Suit No. 4 of 1868.

Plaintiff sued to recover Rupees 35,686-8-0, principal and interest due by defendants on account of dealings at plaintiff's shop up to 5th November 1865. The plaint stated that, on the 23rd October 1860, the second defendant, with the consent of the first defendant and the husband of the third defendant, adjusted the accounts, when the defendants became indebted to the plaintiff in the sum of Rupees 27,964-10-0. That by subsequent transactions, extending to 5th November 1865, the debt was increased to the amount sued for.

The defendants pleaded that the suit was barred by the Act of Limitations; that they had had no dealings with the plaintiff from October 1860 to 1865, nor had any adjustment of accounts been made by the second defendant; that as an arbitrator in Suit No. 29 of 1865, on the file of the Civil Court of Bellary, the plaintiff declared that the alleged trade between these defendants had occurred in February 1863; and that from the accounts produced by the plaintiff it would appear that the dealings between plaintiff and defendants did not cease in November 1865, but were continued up to 1867.

(a) Present :—Scotland, C. J. and Innes, J.

1871. May 17. R. A. No. 69 of 1869. (O. M. P. Nos. 100 & 125 of 1870.)

The Civil Judge in his judgment said—

"The vakils for the defendants argued that the suit was barred under Clause 9, Section 1, Act XIV of 1859, eight years having elapsed from the date of the alleged settlement of the accounts and the date of plaint. They also referred to the case of *Subbaráma v. Eastulu Muttusámi*, 3. M. H. C. 378.

The plaintiff's vakil urged that the suit was not barred, because the accounts sued upon were between merchants who had mutual dealings, and that, therefore, Section 8 of the Limitation Act applied, and the period of limitation should be computed from November 1865, when the dealings ceased.

It is quite clear, however, that there were no mutual dealings between the parties. The plaintiff's vakil admitted that all the items credited to the defendants were payments in liquidation of their dealings at the plaintiff's shop, which dealings were shown in the items to defendants' debit. There was no reciprocal dealing between the parties, and I therefore ruled that the limitation must be governed by Clause 9, Section 1 of the Act.

The suit having been filed on the 28th January 1868, the different items from October 1860 to 27th January 1865 are all barred. From this last date to 5th November 1865, the plaintiff's accounts, produced in Court, show items of receipt and disbursement, from which the Court cannot conclude that the defendants are indebted to the plaintiff, and, therefore, for this period there is no cause of action.

I accordingly dismiss the plaintiff's suit with costs."

The plaintiff appealed. The appeal was heard on the 18th February 1870, when the judgment of the Lower Court was confirmed. A Review of this judgment of the High Court having been obtained by the appellant, the case was re-argued by

Mayne for the appellant, the plaintiff.

O'Sullivan, Miller, and *Rámachendraiyar* for the respondents, the defendants.

The Court delivered the following 1871. May 17.

JUDGMENT:—In this case, on very special grounds, a review at the instance of the appellant was granted, for the purpose of determining two questions which were not raised at the hearing of the appeal:—(1) Whether, assuming it proved that the parties met, within 3 years of the institution of the suit, at the striking of the balance stated in the accounts produced by the plaintiff, and that the defendants then, after looking into the plaintiff's books of account, said that the entries and the balance were all right; those facts constituted a settlement of account which gave rise to a new cause of action, and so gave a fresh period of limitation within which to sue for the whole debt:—(2.) Whether the plaintiff was entitled to apply all recent payments made by the defendants to the earlier items of his account, which were barred at the institution of the suit, and so entitle himself to recover the undischarged debts incurred within 3 years of the suit.

R. A. No. 69 of 1869. (C. M. P. Nos. 100 & 125 of 1870.)

It appears from the plaintiff's accounts with respect to which the settlement is alleged to have taken place, that they consist, on the debit side, of a number of charges against the defendants, for prices of goods and hundis sold, running over several months, and of cash advances on loan: and, on the credit side, of payments received from the defendants, on account, at different dates, in cash and by means of hundis. In its facts, therefore, the case presented is this, the ascertainment, by reference to the plaintiff's accounts, of the whole amount of the items on the debit side and of the payments on account credited on the other side, and the acknowledgment of the balance appearing thereupon to be due. In other words, a case of part payment, at intervals, of a varying debt, and the admission of the correctness of the entries in the plaintiff's books, and the balance shown by them.

In arguing on the first question, the learned counsel for the appellant cited several English decisions upholding the sufficiency of oral acknowledgments to support the common count on an account stated, for the purpose of showing that what had taken place between the plaintiff and defendants was a sufficient settlement of account to support such a

1871. May 17. R. A. No. 69 of 1869. (C. M. P. Nos. 100 & 125 of 1870.)

count. Of this there can (as we said at the time of the argument) be no doubt, as it evidences an admission of the balance being due. It has been long settled that the simple acknowledgment of a debt, evidencing a promise to pay, is enough to support such a count, whether made orally or in writing. It was laid down by Lord Ellenborough in *Highmore* v. *Primrose*, 5 M. & S. 65, that "the count does not import a mutuality of account," and in *Knowles* v. *Mitchell*, 13 East, 249, that "if there were an acknowledgment by the defendant of a debt due upon any account, it was sufficient to enable the plaintiff to recover upon the count for an account stated."—And by Mr. Baron Parke in *Porter* v. *Cooper*, 1 Cr. M. & R. 394, that "if there is an admission of a sum of money being due for which an action would lie, that will be evidence to go to the jury on the count on an account stated." It is equally clear that before Lord Tenterden's Act a bare oral acknowledgment, sufficient to support such a count, would, on the same principle, take a case out of the Statute of Limitations. *Tanner* v. *Smart*, 6 B. & C. 603.

But in England under that Act, and here under the Act of Limitations (Act XIV of 1859), a writing is essential to the sufficiency of a mere acknowledgment for the latter purpose, whether made on a statement of account or otherwise. The class of cases referred to, therefore, is, we think, of no avail to show the sufficiency of the alleged oral statement of account in the present case. Indeed they are wholly inapplicable here, for this Court has decided that, to satisfy Section 4 of the Act of Limitations, an acknowledgment need not evidence a promise to pay, either expressly or by implication. *Nijamudin* v. *Mahammadali*, 4. M. H. C. Reps., 385.

To render an arrangement, come to orally for the payment of the balance of an antecedent debt on a settlement of accounts, available here in support of a suit brought after the expiration of the period of limitation applicable to such debt, it must, we are of opinion, be clearly shown to have amounted to a new valid contract to pay the balance, which extinguished the original cause of action. As observed by Parke, B. in *Jones* v. *Ryder*, 4 M. & W. 32, "a mere acknowledgment within the 6 years of an antecedent debt

cannot be sufficient: there must be a new contract." In England such an arrangement might also be made available in answer to a plea of the Statute of Limitations, on the ground of part payment evidencing a promise to pay the balance:—See on this point *Worthington* v. *Grimsditch*, 7 Q. B. 479, and the judgment of Baron Alderson in *Ashby* v. *James*, 11 M. & W. 542. But that ground is excluded by the provisions of the Indian Act of Limitations.

Then, does the arrangement alleged to have taken place between the appellant and respondent evidence a new contract? The striking of the balance and the admission that the amount was due evidenced a present promise to pay it, but that was nothing more than the law already implied from the previous existence of the debt, and was all that such an executed consideration could support: and it is obvious that, if nothing more than that were necessary, the Limitation bar might always be evaded by acknowledgments and admissions not in writing. What we must look to see is, whether the arrangement involved any new consideration for the promise to pay the balance. Now, where there are cross demands and, on a settlement of accounts, items, agreed to on one side, are wiped out by an appropriation to their discharge of admitted items of claim on the other side, and thereupon a balance is struck and payment promised, the mutual agreement to set off, *pro tanto*, one set of items against the other, constitutes a new consideration for the promise to pay the settled balance, and both make a new contract. For this *Ashby* v. *James*, 11 M. & W. 542, is a direct authority. But where there is no cross claim to be set off, and no new agreement of appropriation, a settlement of the balance due on the examination of accounts is merely a statement of an antecedent debt. The parties simply agree as to how much of the debt remains due. In such a case there is plainly no new contract. This distinction is briefly expressed in *Laycock* v. *Pickles*, 33 L. J. Q. B. 43. Blackburn, J. there said—" In common talk an account stated is treated as an admission of a debt due from the defendant to the plaintiff, but there is also a real account stated, which is equivalent to what is called in the old law an *insimul computaverunt*, when several items of claims are brought into

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account on either side, and being set against one another a balance was struck, and the consideration for the payment of the balance was the discharge on each side." And the arrangement in that case was upheld as being such a real statement of account.

It appears to us that the arrangement in the present case was not such a real settlement. There were no cross demands to be set off or appropriated, but only the plaintiff's accounts of debts and payments made on account of the amount of those debts; and the parties, agreeing as to the correctness of the items in those accounts, ascertained therefrom the balance of the antecedent debt remaining due which the respondents promised to pay. In effect they merely settled how much was the antecedent debt left undischarged by the payments. Immediately after the settlement the appellant might have sued on the original cause of action, and, that remaining, the period of limitation in the absence of a writing continued to run against it. The cases of *Reeves* v. *Hearne*, 1 M. & W. 326, and *Clarke* v. *Alexander*, 8. Scott, N. R. 147, are authorities bearing in support of this conclusion: and the case of *Subbaráma* v. *Eastulu Muttusámi*, 3. M. H. C. Reps. 378, is in principle not distinguishable. We do not think that it makes any difference in the decision of the question that the alleged settlement took place before the period of limitation had elapsed.

In the case cited from 5 Bom. H. C. 16, no point seems to have been raised as to the sufficiency of the adjustment of the account to constitute a new contract, and the decision is confined to the period of limitation applicable to the alleged contract, assuming it to exist.—And the decision of the Bengal High Court reported in 3, *Wyman's Reports*, 41, relates to a cause of action for a balance struck on the settlement of partnership accounts.

For these reasons we are of opinion that the alleged statement of account did not give a fresh period of limitation, and that the decree of the Civil Court dismissing the suit as barred, in respect to the debits incurred down to the 27th January 1865, has been rightly affirmed.

Then as to the 2nd question, the several payments appear to have been made generally on account of the

aggregate amount of the items of debit, and after they were made no specific appropriation of any of them to particular items was ever elected to be made by the appellant, or by him communicated to the respondents, or requested by the latter; on the contrary, if the alleged statement of account took place, a general application of them was mutually agreed to.

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In these circumstances there can be no doubt that the appellant is entitled to have the payments applied to the earlier items making up the debt due to him, for the sound rule of law is that payments unapplied by either the debtor or the creditor should be so appropriated, and that rule is not impaired by the decisions in the cases of *Mills* v. *Fowkes*, 5 Bing. N. C. 455, and *Nash* v. *Hodson*, 6 De G. M. & G. 474; 25 L. J. Ch. 186, referred to by the learned counsel for the appellant. They relate to the effect of a payment to revive a debt which is barred, when there are other debts due at the time of the payment, and show that the debtor's intention to pay on account of the barred debt must appear. The rule as to the right to appropriate a general payment was expressly upheld in the former case, and in the latter the creditor's right to appropriate the general payment in question was recognized.

We think, therefore, that the appellant is entitled to recover the balance, if any, that he can prove to be due and unpaid on account of the items of debit that came within the period of limitation at the institution of the suit; and the Court below must be required to determine the following issue after hearing the evidence which either of the parties may adduce:—

Whether, after applying the payments in discharge of such of the earlier items of the plaintiff's account as were due by the defendants, any balance remains due in respect of the debits incurred within 3 years of the institution of the suit, and if so, what is the amount of such balance?

Appellate Jurisdiction. (a)

Special Appeal No. 73 *of* 1870.

KRISTNA RA'U and another..........*Special Appellants.*
MA'HADE'VA MUDALI..................*Special Respondent.*

Special Appeal No. 74 *of* 1870.

KRISTNA RA'U and another..........*Special Appellants.*
NYNIAPPA MUDALI....................*Special Respondent.*

Special Appeal No. 75 *of* 1870.

KRISTNA RA'U and another..........*Special Appellants.*
SOLAYAPPA MUDALI...................*Special Respondent.*

Special Appeal No. 76 *of* 1870.

KRISTNA RA'U and another..........*Special Appellants.*
CHINNA SUBBU MUDALI.............*Special Respondent.*

Special Appeal No. 77 *of* 1870.

KRISTNA RA'U and another..........*Special Appellants.*
KRISHNA MUDALI.......................*Special Respondent.*

Before a dispute regarding the rate of rent can be decided in a suit brought under Section 9 of Act VIII of 1865, merely on the ground of what appears to be just, the Court must consider the reasonableness of the rate according to local usage, and, when such usage is not ascertainable, according to the rates for neighbouring lands of similar description and quality.

1870. *July* 22. *S. A. Nos.* 73, 74, 75, 76 & 77 *of* 1870.

SPECIAL Appeals against the decision of E. B. Foord, the Civil Judge of Chingleput, in Regular Appeals Nos. 30, 31, 32, 33, 34, 35, 36, 37, 38 and 39 of 1868, modifying the decisions of the Assistant Collector of the Madras District in Original Suits Nos. 1, 2, 3, 4 and 5 of 1868, respectively.

These suits were brought, under Section 9 of Madras Act VIII of 1865, to enforce acceptance of pattahs.

The Assistant Collector in his judgment said—

"The only question that arises in this case is as to what rate of varam should be given by the Zamindár to the ryot. It appears that for ten years the Zamindár has been in the habit of giving 5 kallams, but he alleges that it was his will to do so, and that he was not obliged to give 5 kallams, but only 4, and he adduces in proof of this that

(a) Present:—Scotland, C. J. and Kindersley, J.

in the accounts prepared by the karanams in his kachahrí, 4 kallams were entered as the varam, and the odd kallam, making the fifth, was entered as one kallam jashti. On examining the accounts previous to the year, the balance appears to be in favor of 4 kallams being the varam, the best that is at any time entered for the ryot being 4 kallams and 6 markals. It is impossible to find out with certainty what the varam really is, and under these circumstances, I take advantage of the latter part of Clause III of Section XI of the Act, by which, in the event of the varam being unascertainable, the Collector is authorized to fix such rates as may appear to him to be reasonable. I consider that 4 kallams and 6 markals would be a proper assessment, and accordingly direct that the pattah now tendered by the plaintiffs be altered in such a way as that 4 kallams and 6 markals do appear in it as the rate of varam instead of 4 kallams, and that defendant do accept such pattah, so amended as above, as may be given him by the plaintiffs, and execute a muchalka in accordance with the same, agreeably to Section 10 of the Act.

Plaintiffs and defendants presented cross-appeals to the Civil Court.

The Civil Judge in his judgment modifying the decision of the Assistant Collector, said—

"These suits were brought under Act VIII of 1865 by the same plaintiffs, who are Zamindárs, against the several defendants, who are their tenants, to enforce the acceptance by them of pattahs alleged to have been tendered in accordance with Section 7 of the said Act.

The defendants objected to receive their pattahs on the grounds that they were entitled to 5 kallams out of 10 of the crop, whereas only 4 kallams out of 10 were allowed to them in the said pattahs.

The Assistant Collector found that, for the ten years previous to the institution of the suits, the defendant had received from the plaintiffs 5 kallams out of 10 of the crop, but on examining the karanam's accounts for the period of ten years previous to the above ten years, he found that, according to the 'varam,' sometimes 4 kallams and some-

1870. July 22. S. A. Nos 73, 74, 75, 76 & 77 of 1870.

times 4 kallams and 6 markals were received by the cultivators. It being therefore, in his opinion, impossible to ascertain the 'varam,' he decreed under the concluding part of Clause 3, Section 11 of the said Act, that defendants should receive 4 kallams and 6 markals, as being a rate which appeared just to him, and ordered that pattahs so amended should be received by the defendants.

Both parties appeal against these decisions, the plaintiffs on the ground that the rates decreed are too high, and the defendants on the ground that they are too low. I am clearly of opinion that in all these cases the defendants are entitled to receive 5 kallams out of 10 as their share of the crop, because, I think, that the plaintiffs' admission that they have divided the crop with defendants at that rate for the ten years previous to the institution of this suit, bars them from reducing that rate, which, in fact, amounts to raising the rent upon the lands in defendant's occupancy, except on the ground of improvements made by them (plaintiffs). No such ground is even suggested by the plaintiffs.

For these reasons, I resolve to modify the decisions of the Assistant Collector, and to adjudge the defendants entitled to five-tenths of the crop, and I direct that pattahs so amended be granted by the plaintiffs to the several defendants."

The plaintiffs appealed to the High Court.

Sanjiva Ráu for the special appellants.

Savundaranáyagam Pillai for *Sloan*, for the special respondent in No. 73.

The Court delivered the following

JUDGMENT:—*In Special Appeal No. 73 of* 1870. This was a suit brought before the Collector to compel the acceptance of a pattah by the defendant as the tenant of the plaintiffs, under Madras Act VIII of 1865; and the question raised between the parties was whether the defendant was entitled to a larger kudivaram than 4 kallams out of 10. The Assistant Collector who heard the case decreed, under the concluding part of Clause 3, Section 11 of the Act, that four kallams

1870. July 22. S. A. Nos. 73, 74, 75, 76 & 77 of 1870.

and six markals out of ten was the just rate, and ordered the acceptance of a pattah at that rate.

Both sides appealed to the Civil Court, and that Court modified the Assistant Collector's decree by ordering the acceptance of a pattah allowing to the defendant five kallams out of ten. And the Court appears to have so decided on the ground that the crop had been divided at that rate for 10 years previous to the institution of the suit, and that that rate was reasonable and just.

This mode of dealing with the case, it appears to us, has not given due effect to the provisions in Clause 3, Section 11 of the Act. Before a dispute regarding the rate of rent can be decided in a suit like the present, merely on the ground of what appears to be just, the Court must consider the reasonableness of the rate according to local usage, and, when such usage is not ascertainable, according to the rates for neighbouring lands of similar description and quality. It is necessary, therefore, to require findings on the following issues :—

What is the proper rate of rent to be inserted in the pattah according to local usage, or if such usage be not ascertainable, then, what is the proper rate of such rent according to the rates established or paid for neighbouring lands of similar description and quality ?

If the evidence does not warrant a finding on these points, then a finding should be returned on the further issue,—What, in the judgment of the Court, is the just rate ?

On behalf of the appellant this Court has been asked to admit as evidence three muchalkas executed by the defendants in Special Appeals Nos. 73, 75, 77, and two others said to be in the record of a suit in the District Munsif's Court at Poonamallee. We think these documents should be received on their genuineness being proved or admitted.

Special Appeals Nos. 74, 75, 76, & 77 *of* 1870. Our judgment in Special Appeal No. 73 equally applies to these appeals, and they will be disposed of on the findings which may be returned in that appeal.

Appellate Jurisdiction. (a)

Regular Appeal No. 129 *of* 1869.

LEKKAMANI, widow of the late Tirumalai Puchaya Naikar, Zamindár of Marungapúri...	*Appellant.*
SRIMAT RANGA KRISTNA MUTTU VIRA PUCHAYA NAIKAR, present Zamindár of Marungapúri, and another	*Respondents.*

Zamindárs and Poligars and others in a like position, and occupying tenants, possessed different proprietary rights in land by recognition of the Government before the passing of Regulation XXV of 1802. By it the Government declared with the force of law their acknowledgment and confirmation of such rights, as they were then enjoyed, and in order to quiet all uncertainty and disquietude respecting them, and to establish general certainty of tenure in the holders of the same, provided for the permanent assessment of all lands liable to pay revenue to Government; and for the issuing thereupon of express hereditary grants to every Zamindár and other intermediate proprietor, and written engagements between them and their tenants:—and therefore the Regulation does not operate to exclude or disfavor the maintenance of a claim against the Government to a hereditary or other estate in lands, which has not been secured the benefits of a settled title under the Regulation, because, for political reasons, the Government has thought it inexpedient to give full effect to its enactments. But claims of title to such estates are merely left without the conclusive proof of hereditary title afforded by an Istimrárí Sannad. It was never intended that the Government, by delaying to do in regard to some estates, what the Regulation enacts should be done in regard to all lands for the purpose of setting at rest all uncertainty as to titles, should secure the power to treat all such estates as held by no permanent title whatever. The existence of a proprietary estate in poliems or other lands not permanently assessed, and the tenure by which it has been held, are, therefore, matters judicially determinable on legal evidence, just as the right to any other property.

1870. *May* 27. 1871. *April* 26. *R. A. No.* 129 *of* 1869.

THIS was a Regular Appeal from the decision of W. M. Cadell, the Acting Civil Judge of Trichinopoly, in Original Suit No. 30 of 1868.

The suit was brought by the plaintiff, as the senior widow and legal heiress of the late Zamindár of Marungapúri, for the recovery of the Zamindárí.

The plaint stated that the Zamindárí was the ancestral property of the plaintiff's husband Tirumalai Puchaya Naikar; that he enjoyed the same until his death, which took place on the 17th July 1864, and that, according to Hindu law and the custom prevailing in Zamindárís, plaintiff, as the royal wife of the deceased, was entitled to succeed. That on the day preceding his death, the said Tirumalai Puchaya

(a) Present:—Scotland, C. J. and Innes, J.

Naikar directed that the plaintiff should be constituted his heir and that the affairs of the Zamindárí should be carried on by his cousin under the orders of the plaintiff. That intimation of plaintiff's having been constituted his heir was duly made to the Collector, and that up to the 17th January 1866, when the aforesaid cousin of the deceased died, plaintiff was under the impression that he, the said cousin, was managing the affairs of the Zamindárí. That then plaintiff began to suspect that Government had interfered with the affairs of the Zamindárí, and that in March 1866 she wrote to the Collector and to the Board of Revenue, but without success; that on making further inquiries, she ascertained that her deceased husband's said cousin had concealed her husband's arzi, and had represented to the Collector that the deceased Zamindár had constituted the minor, Ranga K. M. Puchaya Naikar, his heir, and that the estate was then under the management of the Court of Wards.

The defendant (the Collector) answered that the Zamindárí being an unsettled poliem, the right to nominate a successor to the same was vested in the Government; that the Government, in the exercise of this right, had constituted the minor, Ranga K. M. Puchaya Naikar, heir to the Zamindár, and that such act, being an act of State, could not be questioned by any Municipal Court. That even if the Zamindárí were not an unsettled poliem, the minor, as the undivided half-brother of the deceased Zamindár, would be the rightful heir thereto, and that the late Zamindár had recognized the minor's right in a letter to defendant.

Three issues were raised,—

Whether the Court was competent to entertain the suit.

Whether the plaintiff or the half-brother of the deceased Zamindár was entitled to succeed to the Zamindárí.

Whether the said Ranga K. M. Puchaya Naikar was the half-brother of the deceased Zamindár.

Before the final hearing, Ranga K. M. Puchaya Naikar having come of age was, on the application of plaintiff's Vakíl, made second defendant in the suit. On the day appointed for the final hearing, the 16th August (1869), the Advocate General appeared for the second defendant and requested a

1870. May 27. R. A. No. 129 of 1869.

postponement until the 28th August, which was granted. On this day the plaintiff's Vakíl and the Vakíls for the second defendant put in a rázináma which purported to be an adjustment of the matter in dispute between these parties. The Advocate General, as senior counsel for the second defendant, objected to the filing of this document, on the ground that he was entirely unaware of its nature and contents, and it was ordered that the filing of the rázináma be postponed until the case was fully heard. The case came on again for hearing on the 31st August, when the Advocate General appeared for the first defendant, the Collector—at the same time intimating that he no longer appeared for the second defendant. The Court was of opinion that, as there was no evidence of the Zamindárí having been made over, and as the first defendant had not been by any act of the plaintiff relieved from his responsibility as first defendant in the suit, he was entitled to be heard. The Advocate General then called and examined the first defendant (the Collector) who produced the proceedings of Government of the 17th September 1864, conveying the orders of Government as to the succession to this poliem. Proceedings showing the recognition by Government of the succession of the former Zamindár were also put in evidence.

The plaintiff's Vakíl declined to cross-examine and requested a further postponement, which the Court refused to grant. Thereupon the Vakíl retired from the case.

The Court was of opinion that "the evidence of the first witness (the first defendant) has conclusively shown that the Marungapúri Zamindárí is an unsettled poliem, and that the right of succession to such poliems has not only, in the case of this poliem, been admitted and exercised in the case of the present and past succession, but that this right has been declared by the highest authority to vest in the local Government and not in the line of lineal succession. Such being the case, it follows as a matter of course that this right cannot be called in question in this Court, and on the first issue the finding must, therefore, be for the first defendant. It is unnecessary, therefore, to enter on the other issues, but with regard to the rázináma tendered by the plaintiff and the second defendant, the Court is also of opinion that, in a

case like the present, and in which it has been found that the plaintiff has no right to bring such a suit, it is not competent to the Court to entertain a document which purports in any way to be an adjustment or settlement of such claim.

1870. May 27. R. A. No. 129 of 1869.

The claim of the plaintiff is, therefore, dismissed."

The plaintiff appealed.

Mayne and *Karunákara Ménon* for the appellant, the plaintiff.

The *Advocate General* for the 1st respondent, the 2nd defendant.

The *Government Pleader* for the Collector, the 1st defendant.

The following judgment was delivered by

1871. April 26.

SCOTLAND, C. J.—This is a suit by the senior widow of the late Zamindár of Marungapúri to recover the zamindári estate, together with the pannai lands enjoyed therewith and certain jewels, the whole being in the possession of the defendant (the Collector) as the Agent of the Court of Wards and guardian of the alleged minor, who is the half-brother of the late Zamindár. The material part of the defence made by the Collector's written statement is, in effect, that the property is not a hereditary zamindári but an unsettled poliem in which the late Zamindár had only a life estate, and had been granted by the Government on the Zamindár's death to the minor, and such grant, being an act of State, could not be questioned in the suit. But that if a hereditary zamindári, or poliem, the minor, as the undivided half-brother of the late Zamindár, is the rightful heir to the whole property. Issues were framed raising those points of defence, and after several adjournments of the hearing of this suit, at the instance of both parties, for the reasons stated in the judgment of the Court below, the cause stood for trial in that Court on the 28th of August 1869. In the interval, the minor having attained his full age, he was, on the application of the plaintiff's Vakíl, made a supplemental defendant.

On the 28th of August the Advocate General, on whose application, as counsel for the minor as supplemental defendant, the last adjournment had been granted, appeared to conduct the defence. But the Vakíls for the plaintiff and

1871. April 26. R. A. No. 129 of 1869.

the supplemental defendant put in a rázinâma by which these parties agreed to an adjustment of the suit on certain terms. The Advocate General objecting that this was a surprise to him and might not be received, the case was again adjourned until the 31st of August. On that day the Advocate General stated that he appeared for the Collector, and no longer for the 2nd defendant, and after the Court had heard his arguments as to the Collector's right to insist on the several points of his defence, and those of the Vakíl for the plaintiff on the point of the admission of the rázinâma, the cause stood over for judgment to the next day. The Civil Court then decided that the Collector was entitled to be heard in support of the defence, and the Advocate General immediately called and examined the Collector as a witness, and put in evidence certain proceedings of the local Government upon which he relied. The Vakíl for the plaintiff declined to cross-examine the witness, and prayed the further adjournment of the hearing to admit of his client's obtaining the services of Mr. Mayne, who had appeared as his counsel on the occasion of the adjournment immediately before that obtained by the Advocate General; and, on the Court's refusing to accede to this application, the Vakíl declined to act further in the conduct of the case. Thereupon the Civil Judge appears to have given judgment dismissing the suit, on the ground that as the evidence of the Collector showed not only that the estate was a life poliem, and the right of succession to it was vested in and had been exercised by the Government, but also that such had been declared to be the nature of the proprietary right by the official act of the Government in making the grant to the minor, the Court had not jurisdiction to entertain the suit, and therefore could not consider the question as to the reception of the rázinâma.

The objections to this determination raised by the appellant (the plaintiff) are, that in point of evidence the case was not before the Civil Court in such a way as to warrant the finding as to the proprietary right, and that the rázinâma ought to have been received and a decree passed in conformity therewith. With respect to the latter objection, we think it enough to say that it is met by the altered position in which the supplemental defendant has placed himself. He

now appears as a resisting respondent in the appeal, represented by the Advocate General, and altogether repudiates the acceptance of the rázináma, as an adjustment of the suit. He cannot be compelled to submit to a decree in the terms of compromise which he has withdrawn from, and now resists the acceptance of, by the Court. Then, as to the former objection,—There is nothing in the record to justify a conclusion adverse to the *boná fides* of the parties in entering into the rázináma, or to indicate that it is otherwise than reasonable to believe that the plaintiff's Vakíl might expect, down to the time of the judgment, that if the rázináma was not received, further time would be given for the production of evidence and a full hearing: and his application for a postponement ought, we think, in the peculiar circumstances, to have been attended to. Looking, then, at the case as it stood when judgment was given, it appears right that all the questions between the parties arising out of the claim and subject-matter of the plaint, and involved in the relief prayed, should be tried and determined, and, if necessary, that the Court's power to add issues should be exercised.

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For these reasons we held at the close of the arguments on the first day of the hearing of the appeal, that upon the case presented by the record returned by the Court below, the decree could not stand; and we adjourned the further hearing to admit of the parties producing before this Court their evidence bearing on the question of the nature of the deceased Poligár's right in the property, which appeared to be altogether documentary,—Reserving for consideration, if necessary on the determination of that question, the issue or issues to be sent for trial by the Court below. Before proceeding to deal with this question, we will dispose of the preliminary objection of the Agent of the Court of Wards, upheld by the Court below, but not seriously relied upon before this Court, that the Government Proceedings granting the property to the minor constituted an Act of State which debarred the cognizance of the suit by a Municipal Court; and we think it enough to repeat our observation at the first hearing, that, assuming the proceedings to evidence a grant of the property, the objection is quite untenable. The Government acted upon what was

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believed to be its right under the Municipal law, and can claim no exemption from the jurisdiction of the Courts to entertain a suit questioning a right of that nature.

With respect to the proprietary right possessed by the late Zamindár. There is now before the Court the whole of the evidence which the parties have been able to adduce, and we have had the advantage of hearing the case ably argued. The question for determination is, whether he had vested in him a hereditary estate which passed on his death to his heir in the order of legal succession, as the plaintiff contends; or an estate for his life, on the termination of which the right to dispose of the property reverted to the Government, as the defendants contend. The villages and lands mentioned in the plaint form one of the Manapúri poliems, but the estate and the holder of it have been commonly given the designations used in the plaint, of Zamindárí and Zamindár; it is, however, a conceded fact that no Istimrárí Sannad, granting the estate under Regulation XXV of 1802, has ever existed. And the positions advanced on both sides, stated summarily, are—on behalf of the plaintiff—That there is sufficient evidence from which to draw the inference that the property had been permanently assessed. But if not, that the tenure by which poliems, not permanently assessed, are held, had not attached to it, as an essential incident, the limit of the life of the holder; but that both historically and by judicial authority the tenure is rather shown to be in its nature hereditary. That it may be either hereditary, or for life, according to the nature of the grant creating it, and that, in the present case, the evidence proved the poliem to have been held as an hereditary estate.

On behalf of the defendants the opposite to each of these positions was maintained, and the arguments against the first went to the length of contending for the major proposition, that there were no hereditary proprietors of land between the Government and the cultivators of the soil, except the rightful holders of estates permanently settled under Regulation XXV of 1802.

In dealing with this question of proprietary right, it is important at the outset to ascertain how far it is affected

by the authority of judicial decision. There are the decisions of this Court in the cases of *Subba Chetty* v. *Masti Immadi Ráni*, 3 M. H. C. Reps. 303, and *Arbuthnott* v. *Oolagappah Chetty*, 5 M. H. C. Reps. 303, in which poliems not permanently settled were treated as estates for life only, but in neither of them was there any question raised as to the nature of the Poligár's holding. They amount to recognitions of poliems held on life tenure, but certainly not of that tenure as their peculiar and only kind of tenure. Indeed, this Court in the case of *Chauki Gounden* v. *Venkataramanier*, 5 M. H. C. Reps. 211, gave an express intimation of a different impression by the observation in the judgment :—" the Poligár of an unsettled poliem may, according to the generally received theory as to his rights, have only an estate for life in his poliem; but *for such an estate as he has*, his relation to the Government on the one side, and to the occupiers of lands within his poliem on the other side, resembles that of a Zamindár :" and in *Peddamuttu Víramani* v. *Appu Rau*, 2 M. H. C. Reps. 117, the Court acted on the assumption of the existence of a hereditary estate in a poliem.

The other cases referred to in the course of the argument as bearing directly upon the question are *Náragunty Lutchmeedavamah* v. *Vengama Naidoo*, 9 Moo. I. A. 66, and *The Collector of Madura* v. *Veeracamoo Ummal*, Ib. 446, both relating to poliems not permanently settled. In the former the question was whether the poliem was ancestral property and as such passed to the plaintiff, the undivided cousin of the last Poligár, in preference to his widow. Their Lordships who decided the case accepted the description of a poliem given in Wilson's Dictionary, and the corresponding account given in the 5th Report of the Select Committee on the affairs of the East India Company in 1812, to the effect that originally Poligárs were petty chiefs subject to tribute and service to the paramount State, which they seldom paid, and were more or less independent; but under the rule of the East India Company they had become peaceable landholders: and they determined that the estate was ancestral and passed to the plaintiff, upon a consideration of the evidence in the case as to the descent and enjoyment of the property.

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postponement until the 28th August, which was granted. On this day the plaintiff's Vakíl and the Vakíls for the second defendant put in a rázináma which purported to be an adjustment of the matter in dispute between these parties. The Advocate General, as senior counsel for the second defendant, objected to the filing of this document, on the ground that he was entirely unaware of its nature and contents, and it was ordered that the filing of the rázináma be postponed until the case was fully heard. The case came on again for hearing on the 31st August, when the Advocate General appeared for the first defendant, the Collector—at the same time intimating that he no longer appeared for the second defendant. The Court was of opinion that, as there was no evidence of the Zamindárí having been made over, and as the first defendant had not been by any act of the plaintiff relieved from his responsibility as first defendant in the suit, he was entitled to be heard. The Advocate General then called and examined the first defendant (the Collector) who produced the proceedings of Government of the 17th September 1864, conveying the orders of Government as to the succession to this poliem. Proceedings showing the recognition by Government of the succession of the former Zamindár were also put in evidence.

The plaintiff's Vakíl declined to cross-examine and requested a further postponement, which the Court refused to grant. Thereupon the Vakíl retired from the case.

The Court was of opinion that "the evidence of the first witness (the first defendant) has conclusively shown that the Marungapúri Zamindárí is an unsettled poliem, and that the right of succession to such poliems has not only, in the case of this poliem, been admitted and exercised in the case of the present and past succession, but that this right has been declared by the highest authority to vest in the local Government and not in the line of lineal succession. Such being the case, it follows as a matter of course that this right cannot be called in question in this Court, and on the first issue the finding must, therefore, be for the first defendant. It is unnecessary, therefore, to enter on the other issues, but with regard to the rázináma tendered by the plaintiff and the second defendant, the Court is also of opinion that, in a

case like the present, and in which it has been found that the plaintiff has no right to bring such a suit, it is not competent to the Court to entertain a document which purports in any way to be an adjustment or settlement of such claim.

The claim of the plaintiff is, therefore, dismissed."

The plaintiff appealed.

Mayne and *Karunákara Ménon* for the appellant, the plaintiff.

The *Advocate General* for the 1st respondent, the 2nd defendant.

The *Government Pleader* for the Collector, the 1st defendant.

The following judgment was delivered by

SCOTLAND, C. J.—This is a suit by the senior widow of the late Zamindár of Marungapúri to recover the zamindárí estate, together with the pannai lands enjoyed therewith and certain jewels, the whole being in the possession of the defendant (the Collector) as the Agent of the Court of Wards and guardian of the alleged minor, who is the half-brother of the late Zamindár. The material part of the defence made by the Collector's written statement is, in effect, that the property is not a hereditary zamindárí but an unsettled poliem in which the late Zamindár had only a life estate, and had been granted by the Government on the Zamindár's death to the minor, and such grant, being an act of State, could not be questioned in the suit. But that if a hereditary zamindárí, or poliem, the minor, as the undivided half-brother of the late Zamindár, is the rightful heir to the whole property. Issues were framed raising those points of defence, and after several adjournments of the hearing of this suit, at the instance of both parties, for the reasons stated in the judgment of the Court below, the cause stood for trial in that Court on the 28th of August 1869. In the interval, the minor having attained his full age, he was, on the application of the plaintiff's Vakíl, made a supplemental defendant.

On the 28th of August the Advocate General, on whose application, as counsel for the minor as supplemental defendant, the last adjournment had been granted, appeared to conduct the defence. But the Vakíls for the plaintiff and

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for property, they concluded at once on its absolute extinction. The same theory, it is true, has been maintained in more recent times by able English writers, but it has also been forcibly assailed by others of not less ability; and looking at the subject from a judicial stand-point, all, it seems to us, that can be said, is, that what little exists of recorded tradition and events, affords some support for diverse views, but no firm ground on which to rest a positive assertion.

At the present day a judgment with respect to property in land must necessarily, we think, be formed upon what has been under British rule the Legislation relating to land; the course of usage in regard to the acts and dealings of the Government and individuals with landed interests, and the nature of the proprietary rights which judicial decisions have confirmed and enforced; and, upon those grounds, we apprehend it may be laid down as a sound conclusion, that whatever be technically the correct theory as to the person in whom the soil originally vested, and the precise nature of the rights over land formerly acquired by the ruling power, or Zamindárs and Poligárs, before the British rule; the Government, in respect to lands held by ryots, in which private intermediary interests have never existed, or once existing have been completely terminated, and lands lying waste; and Zamindárs and Poligárs, in respect to the lands within their zamindáris and poliems, now possess rights of property, as well as the tenant cultivators of such lands. Property in land, as in any other thing, is but a qualified dominion over it. In the most extensive sense it is the dominion enjoyed subject to the restrictions and incidents attached to all land by the general law.—Such was the *plenum dominium* of the Roman law, and is the nature of the "absolute property" of the laws of European and other countries.—And rights of property vary in extent with the degree of dominion. However the dominion over land be circumscribed by the creation of special obligations and modifying rights in others; so long as some substantial paramount dominion remains, the possessor of it has a proprietary interest in the land. He possesses (to use the phrase of modern Roman law) a *dominium minus plenum*, and the owner of the

rights which lessen the paramount dominion has in him a second dominion and property, either as an occupier enjoying the usufruct of the land or as an intermediate proprietor. And that the Government and Zamindárs and Poligárs are possessed of such a paramount dominion, and consequently a property in the several lands just specified, is a matter, we think, now put beyond question by the effect of their continual exercise of the rights of disposition and improvement, and other rights of a proprietary nature, from the earliest times of settled British rule, and the provisions for the maintenance and furtherance of such rights found throughout the Regulations and Acts relating to both permanently and periodically assessed lands; and by the numerous decisions of the tribunals of the country and the Privy Council upholding and enforcing the same. The *plenum dominium*, or absolute proprietary right in land, may now, no doubt, be in the person who carries on its cultivation, and be evidenced to have come from first occupancy. But, in our judgment, the pervading principle of Executive Government, Legislation, and Judicial decisions is, that where the holding of the cultivator is ryotwári or for a limited term of years, Zamindárs and other middlemen having similar rights, or the Government when there is no such person intervening, possess a paramount property in the soil, like a seigniory; in which right they receive a rent or return for the possession and use enjoyed by the cultivating tenant; and that, when absolute proprietary rights exist, they must be regarded as derivative from the ruling power in the State. This principle has governed in Canara and Malabar, where the most ancient proprietary rights have been preserved: and with respect to such an absolute proprietary right, it is laid down in the judgment of the Privy Council in the recent case of *Gunga Gobind Mundul* v. *The Collector of the 24 Pergunnahs*, 11 Moo. I. A. 362, that there is not "the relation of landlord and tenant between the Government and the owner of the lands, who is the landlord, and not a ryot. The Government has a title to the rent or jamma. By whatever name it be called, the right and title is to the rent substantially; it does not include a right to the possession of the lands, though such a right might arise by forfeiture, or extinction of the ownership."

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Reverting to the question of title now before the Court, we proceed to consider the conclusion deducible, in our view, from what appears historically as to the nature of the tenure of the proprietary estate of Poligárs at the time of the passing of Regulation XXV of 1802. The learned counsel on both sides rested their arguments upon the 5th Report of the Select Committee on the affairs of the East India Company, presented to the House of Commons in 1812 (Vol. 2 of the Edition of Reports published by Messrs. Higginbotham), as setting forth the true historical view; and certainly we could hardly have a more authentic and instructive guide in forming our conclusion, containing, as the Report no doubt does, the substance of all the information derivable from the official records and reports in the possession or power of the Company's Government.

The name "Poligár" appears to have been applied before the Mahratta Invasion to persons holding, in the southern and western portions of the Madras Presidency, the position of those who had acquired the name of Zamindár in the Northern Districts, and substantially the history of the two classes is similar. Originally the descendants of officers of Police and Revenue Agents of Hindu Sovereigns, they advanced themselves to the positions of chiefs, maintaining military forces and possessing fortresses and strongholds. As such they were employed by Mussulmen rulers in upholding subjection to their Government and managing the collection of revenue; and although (as remarked by Mr. Mountstuart Elphinstone in his *History of India*) it seems doubtful whether they were more than chiefs enjoying some degree of independence before the time of Aurangazíb; yet, in later times, by embracing the frequent opportunities for refractoriness and the extension of their powers, afforded by the weakness and inefficiency of the ruling power, they reached to the independence of tributary feudatories and proprietary holders of land: and that position they, or their descendants, were in general permitted to enjoy hereditarily down to the establishment of British Government. That permission, however, cannot be pronounced to have amounted to a positive recognition establishing their assumed rights generally (except, perhaps, as respects a few who

traced heirship through a long descent from Rajais or officers who had received villages in Inam), because of their not unfrequently having been deprived of their rights. But it can hardly be doubted that it was decisive and retensive enough to give strong claims to such a recognition. Indeed, the Company's officers appear to have at first regarded them as already possessing established titles as landed proprietors; and although that view was, after a time, modified, nothing was done indicating any doubts as to the strength of the claims of both Zamindárs and Poligárs to be secured in such titles; or any wish in opposition to a compliance with such claims.

Among the first acts of the Company's Government were the reinstatement of some Poligárs who had been driven out of their poliems, and the confirmation of the others (save a few who continued rebellious) in the enjoyment of their estates, upon the conditions of rendering to the Government their tribute and services (which were soon after converted into an increased jamma, or rent adjusted according to the productive value of the lands), and of the regular letting of their lands to ryots for cultivation: and when, subsequently, disturbances were caused by the Poligárs of some Districts, the Government, in the course which was deliberately decided upon and pursued, treated them as insubordinate landowners who exercised powers incompatible with the position of subjects, and paid an insufficient jamma. They were coerced to surrender all their civil and military administrative powers, and had their jamma increased to a new temporary assessment to an amount which left them more of the returns from the land than was consistent with any other position than that of proprietors. When, again, on the recurrence, after such assessment, of rebellious conduct on the part of some Poligárs in the Tinnevelly District, their poliems were taken from them, some of the lands were added to the holdings of other deserving Poligárs. Other poliems too, that were given up to the Government because of the discontent of the holders with the new assessment, in order that their actual productive qualities might be known, were, upon the proper rates of jamma being fixed, returned (with the exception of one or

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two sequestered on special grounds) to the former holders, and in one or two instances, at least, to the heir of a former holder.

All these occurrences appear to have taken place before the close of the last century, and the only change since made has been the bringing of some poliems under the permanent settlement and the assessing of the others on the principle of the permanent settlement: and that all were not brought under the permanent settlement was, there can be little doubt, owing solely to the need for that cautious experience which the Board of Directors urged on the Madras Government in 1804 and subsequent years, in consequence of the reasons and objections of the Government against an irrevocable settlement, founded upon grounds of State Policy. On the nature and effect of these settlements and assessments we shall have to observe when we allude presently to the Proceedings of the Board of Revenue of the 14th January 1813.

This review of the salient points of the history of poliems, found in the Report of the Select Committee, confirms the impression derivable from the reported cases in which titles of poliems have been contested, and we think that it is sufficiently apparent that poliems, before the passing of Regulation XXV of 1802, had been acknowledged to be what they have since been dealt with as—proprietary estates held under the Government by either a hereditary tenure, or a life tenure. Now, applying this result to the Regulation, we have next to consider whether, in regard to poliems not permanently settled, it has the effect of declaring positively a different view, namely, as to the past, that private proprietary estates were not existent before; and as to the future, that they would exist only when created hereditarily by a sannad-i-milkíat-i-istimrár, upon a permanent assessment being fixed under the Regulation.

We should not have been prepared to adopt this construction, if nothing more had been before the Court than appears from the Regulation itself. But read by the light which, in our view, history affords as to the mode in which the Company's Government had dealt with zamindárís and

poliems, and together with the subsequent emphatic declaration expressed in Regulation IV of 1822, we feel no doubt that it was intended to be affirmative of existing proprietary rights in Zamindárs and Poligárs and others. The 1st Section, which is in the form of recitals, refers to what had been the mode of administration under Asiatic Rulers for the purpose of augmenting the revenue, and states that it involved the implication of the proprietary right of the ruling power to take possession of all lands for such purpose. It next points out serious evils caused by such a mode of administration, and as one of them, "the diminishing the security of *private property*:" and concludes by declaring that the British Government had determined to remove "so fruitful a source of uncertainty and disquietude," and to make grants to Zamindárs and other *landholders* of a hereditary property in *their land*, subject to a permanently fixed assessment of revenue. Then follows, in Section 2, a positive enactment requiring a fixed assessment to be made on *all* lands, and declaring that, thereupon, hereditary estates should become vested in "Zamindárs or other *proprietors of land*;" and in Section 3 provision is made for the granting of sannads to, and obtaining of kabúlyats from "all persons *being* or constituted to be Zamindárs or proprietors of land." The other Sections of the Regulation relate to lands when brought under permanent settlement.

Without perverting the language of these Sections, we do not see how the Regulation can be said to import the negative declaration contended for; or what other effect can reasonably be given to it than that of a deliberate recognition of existing private proprietorship in land; except, indeed, upon the supposition that the terms "private property," "landholders," "proprietors of land," were used in no definite sense: a supposition quite gratuitous for any thing that appears in the Regulation, or is, we think, presented by history as to the manner in which the Government had before dealt with Zamindárs and Poligárs. However, upon such a supposition doubts would very likely arise, from the introduction of a new system of formal hereditary grants, in regard to the certainty of private rights in those lands which were not soon brought under a permanent assessment; and

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very probably it was doubts of that kind which led to the passing of Regulation IV of 1822.

But whatever were the moving doubts, that Regulation does afford strong confirmation of the view we take of the declaratory effect of Regulation XXV of 1802. It recites, in the 1st Section, that because of doubts regarding the meaning of the latter Regulation and others, it had become necessary to declare that in passing them the Government "had "no intention of authorizing the infringement or limitation "of any established rights of any class of its subjects, such "rights being determinable by judicial investigation only;" and, in the 2nd Section, declares that the provisions in those Regulations "were not meant to define, limit, infringe, or "destroy, the actual rights of any description of landholders "or tenants." There is, certainly, some indication in the Regulation that it was rather meant to apply, as argued for the respondents, to the provisions in the earlier Regulations relating to the relative rights of landholders and occupying tenants. But we must give to the words just quoted their full effect, and hold that the Regulation applies to all rights in land recognized by the Government as established at the passing of Regulation XXV of 1802, or the other Regulations therein referred to. Regulation IV of 1822, therefore, confirms we think, in the clearest manner, the recognition of private property in land when Regulation XXV was passed, and the intention not to interfere with the maintenance of rightful claims to it. Indeed it would have been strange to have found the contrary in effect declared by Regulation XXV of 1802, for then it would, it seems to us, have involved the inconsistency of a declaration adverse to the very intent and purpose of the legislation, or (putting the inconsistency in another form) of providing for the confirmation and effectual settlement of titles which the Government framing the Regulation did not recognize as existing.

On the part of the respondents three decisions of the late Sadr Court, reported in the *1st Vol. of Select Decrees*, pages 80, 141 and 172, were relied upon. They bear directly in support of the valid existence of proprietary estates for life in zamindárís and poliems not brought within Regulation XXV of 1802: but lay down that there can be no hereditary

interest in them, unless created by an Istimrárí sannad granted under that Regulation. For this position the reasons given in the judgments, pages 80 and 172, are that it is deducible from the Regulation and confirmed "by information obtained from other sources," that, prior to the permanent assessment, succession to zamindárís was not governed *exclusively* by the laws of inheritance; but that the ruling power disposed of them as might be considered most expedient for the realization of the public revenue, and, in page 172, there is the additional reason given, that it was clear to the Court that the succession to the property in dispute, which had passed to the next heir, had always depended upon the arbitrary will of the ruling power. With the former part of the deduction our view accords, and so too with the latter part, if it was meant to refer to the mode of administration under Asiatic Rulers; but if it meant to refer to the period of the Company's Government down to the passing of Regulation XXV of 1802, we cannot concur in it. Further, if what is stated in the latter ground was shown by evidence, it was by itself a proper ground for the decision in the case. But the strongest remarks against the weight of the decisions are,—that no clue is given to the source or nature of the information by which the Court was influenced; that the cases were decided some time before the date of Regulation IV of 1822; and in Clause 3, Rule 10, of the Agency Rules of Ganjam and Vizagapatam, made some years after Regulation IV of 1822, we find the Government not denying the right of succession to Zamindárs not permanently settled, but only claiming the inherent right of selection in the case of more than one claimant of the right. For the appellant, reliance was placed on the Judgment of Lord Chancellor Lyndhurst, in *Freeman* v. *Fairlie*, 1 Moo. I. A. 342, deciding that Zamindárs and Tahsildárs of Bengal had a *permanent* property in the soil at the time when the English established themselves in the country. This goes further than our present judgment, but, as it appears to rest upon a series of documents and opinions besides the Bengal Regulations, which are somewhat different from the Madras Regulations, we cannot consider it as a supporting authority beyond the point,—that a course of arbitrary dealings with the land for revenue pur-

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poses similar to that recited in Regulation XXV of 1802, was considered consistent with the existence of the proprietary rights of Zamindárs and others in such land.

For these reasons we are of opinion that Zamindárs and Poligárs, and others in a like position, and occupying tenants, possessed different proprietary rights in land, by recognition of the Government, before the passing of Regulation XXV of 1802. That by it the Government declared, with the force of law, their acknowledgment and confirmation of such rights, as they were then enjoyed, and, in order to quiet all uncertainty and disquietude respecting them, and to establish general certainty of tenure in the holders of the same, provided for the permanent assessment of all lands liable to pay revenue to Government; and for the issuing thereupon of express hereditary grants to every Zamindár and other intermediate proprietor, and written engagements between them and their tenants:—And, therefore, that the Regulation does not operate to exclude or disfavor the maintenance of a claim against the Government to a hereditary or other estate in lands, which has not been secured the benefits of a settled title under the Regulation, because, for political reasons, the Government has thought it inexpedient to give full effect to its enactments. But that claims of title to such estates are merely left without the conclusive proof of hereditary title afforded by an Istimrári sannad. It could never, we think, have been intended that the Government, by delaying to do in regard to some estates, what the Regulation enacts should be done in regard to all lands for the purpose of setting at rest all uncertainty as to titles, should secure the power to treat all such estates as held by no permanent title whatever. It follows that the existence of a proprietary estate in poliems, or other lands not permanently assessed, and the tenure by which it has been held are, in our opinion, matters judicially determinable on legal evidence, just as the right to any other property.

We are thus brought to consider the evidence laid before the Court, and on this point the conclusion contended for on the part of the respondents is, not that the Government have the absolute right to deprive the family of the poliem on

the death of each holder of it, but that they have the right to appoint whom they please of the kindred of the deceased Poligár to be his successor. In effect, that the members of the family have taken successive life estates by express concession of the Government.

The earliest documents in evidence bear date in 1803. They are the letter of the Acting Collector Mr. Watts, and its enclosures, and the Proceedings of the Board of Revenue and resolution of the Government thereon (Exhibits K, Q, and R). The letter communicated that, on commencing the survey of the Manapúri poliems, the holder of the poliem now in dispute had claimed his (the Collector's) intervention, for the purpose of recovering several villages of which his grandfather had been forcibly dispossessed by the ancestors of the Tondiman Rajáh; and enclosed the evidence brought forward to support the claim. Among the documents enclosed was the copy of a grant, inscribed on stone, of some of the villages so seized, as a free and perpetual endowment for the support of a temple:—An act this of absolute ownership. The opinion of the Board and the Government resolution were to the effect, that although considerable hardship appeared to attend the case of the applicant, he could not recover the villages after the lapse of so long a time. These documents were used for the Appellant, partly to show that the poliem was then regarded as an ancestral estate which had come down to the applicant by right of hereditary succession; and we think they have that effect, at all events from as far back as 1691. But not the further effect contended for, of showing that the successions had been quite independent of the control of the Government, for, consistently with what the document sets forth, each successor, although heir according to the order of legal succession, might have been nominated by the ruling power. On this point more, we think, cannot be said in connexion with these documents, than that the exercise of such control is rendered improbable by the non-production of any document from the Government records tending to evidence it: and this improbability must have its due weight in considering the other evidence

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as to what occurred on successions since the date of the Government order.

The next document in point of date is the letter of the Collector, Mr. Parish, to the Board of Revenue, of the 8th June 1804, explaining the nature and amount of new assessments then made on the Manapúri and other poliems; and it is important as showing that those assessments were a considerable increase on the former rates, and made upon the same principle as the permanent assessments on Zamindárís secured by the grant of sannads under Regulation XXV of 1802; that principle having been before applied to other unsettled properties, without objection on the part of the holders. But, in judging of the effect of this evidence, we must consider it with the information afforded by the Proceedings of the Board of Revenue, dated the 14th June 1863 (Exhibit 34), relating to such assessments. Those proceedings, it appears, were consequent upon the resolution of the Government proposing the issue of permanent sannads to the holders of poliems throughout the country; and they show that, in 1802, permanent settlements of peshkash had been effected in regard to the poliems in the Ceded Districts and Tinnevelly, the Ramnad and Shevaganga Zamindárís in Madura, and those known as the western poliems, upon the principle generally adopted in the permanent assessment of zamindárís under Regulation XXV of 1802. That, about the same time, assessments upon a different principle were made on the Dindigul poliems; but they were subsequently re-assessed upon the same principle.

That the Government approved such re-assessment, and confirmed the settlement of all the poliem estates in perpetuity, and thereupon sannads, under Regulation XXV, were actually issued in 1805, but not delivered to the holders of the poliems, owing, it would seem, to some doubts as to whether forfeitures had not occurred by reason of frequent sales having taken place, and that Mr. Parish's assessments were recognized as the extension of a similar mode of assessment to the Manapúri poliems, and had been continued in force ever since, except as regarded one poliem (Mambaray), but no sannads had been issued. The Board, with reference

to this extension, remark, that at the time the assessments were imposed "it was probably intended to extend to these poliems the permanent settlement which had been made on the poliems of Dindigul." They might have expressed this with certainty, since it appeared on record in the Proceedings of their office, in 1815, with reference to the Manapúri assessments, that "it was fully intended to extend to those poliems the permanent settlement, on the Zamindári tenure; but, whether in consequence of the Collector having neglected to submit the previous report necessary for the purpose, or in consequence of the discussions which subsequently arose respecting the inexpediency of extending that system, it does not appear that this intention has ever been carried into effect. The result has been that, although the demand on the poliems has since continued invariably the same, it has not been considered regular and legal on the occurrence of arrears to enforce the Regulations of 1802." The Board then, after reviewing the subsequent official communications relating to the several poliem estates, concluded by recommending that "all existing Poligárs be confirmed in their tenures on the present terms as regards peshkash, and that sannads of permanent settlement be granted to all who are willing to accept them."

The legitimate conclusions deducible from all that is stated in those Proceedings and the other documents above referred to, we consider to be these:—The Government appear to have always dealt with the Manapúri poliems as ancestral estates, passing by succession in the families of the holders. They have never retained any of the poliems, except on an escheat for failure of heirs, or a voluntary surrender in consideration of a malikhána allowance, or when poliems were resumed for the purpose of being kept under management temporarily, or until redeemed by the payment off of arrears of peshkash (which occurred once as respects the poliem now in dispute), instead of attempting to sell the estate, or enforcing payment against the persons of the Poligars owing the arrears, or their property generally; and although these Manapúri poliems have never been permanently settled under Regulation XXV of 1802, they have been

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continued, for more than half a century before the institution of the suit, under an assessment equivalent to that fixed on zamindáris permanently settled under that Regulation, and made with the intention of its becoming permanently fixed by the grant of sannads,—In effect have practically been permanently settled ancestral estates, in the estimation of the Government, from the time of Mr. Parish's assessments. In support of the latter conclusion we have the additional circumstance that the poliems are described as "permanently settled" in the statement of Revenue accounts from Fasli 1275 to 1278, furnished by two Collectors (Exhibits M. & N.), and in the letter of a third Collector, addressed to the Board of Revenue. The Advocate General argued that that description was shown to be a mistake by the letters of another Collector, in Exhibits 14 and 5, correcting the statement in the latter communication: and, no doubt, the correction was right, if the statement was understood to mean permanently settled under Regulation XXV of 1802, which we may consider to have probably been the case, when we find from Exhibit N. that the description was continued for 2 years after the date of the letters of correction. This argument, therefore, does not remove the force which we give to the description. Further, we have yet stronger proof of the conclusion in the fact appearing from Exhibit 14, that, so recently as 1866, it was determined by the Revenue Board that a sannad should be offered to the late Poligár when he came of full age.

We have, next, to consider the force of the direct evidence relied upon as showing that the Government have exercised a control over the course of succession. The Revenue Board, in their Proceedings of 14th January 1863, para. 25, assert the right to nominate as successor, on the occasion of a death, a person who had no claim to it according to the general law of succession, and if that has been established, the plaintiff is not entitled to the poliem, although a family estate. The earliest succession of which there is any particular evidence took place in 1811 or 1812, and the succession of the late Poligár, in 1854, was the next. The former was denied on the part of the Respondents, but nothing was suggested to cast a doubt on the fact appearing from the certified copy of the record in Original Suit No. 49 in the

register of the Southern Provincial Court (Exhibit 6), that in consequence of a death in 1811 or 1812, the right to the succession was litigated in that suit, and determined in 1813 by a decree in favor of the defendant as the heir of his father, who had inherited from his grandfather. We cannot, therefore, doubt the fact of a succession at that date. And there is not the least evidence to show that control was then exercised by the Government; but an inference to the contrary may be drawn from the fact that there was no mention of any control in the suit; besides, it is highly probable that, if any had been exercised, some evidence of it would have been forthcoming from the Government records. Consequently, we must take it that the Government had exercised no further control than we have already alluded to (which does not appear to have touched the right of succession) at the date of the death of the late Zamindár's predecessor in 1854.

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The evidence relating to the succession of the late Zamindár are the letters of the Sub-Collector to the Collector (Exhibits 10, 11) and the Proceedings of the Board of Revenue and the Government order thereon (Exhibits 33 and 12). In his first letter the Sub-Collector reported the death of the Zamindár and his having recognized his son as heir, and that, on receipt of further communication from the Tahsildár, he would submit his opinion on the right of the son to the succession. In his second letter he gave a statement of the family of the deceased, showing that the heir recognized by the Zamindár was his eldest son, and recommended that he should be recognized and invested as Poligár. The Collector then forwarded a similar recommendation to the Board, who submitted it to the Government, recommending that as the person named was the eldest son and to be presumed capable of managing the property, he should be recognized as proprietor in succession to his father; and thereupon the Government passed an order recognizing the eldest son as Poligár, in succession to his deceased father, and his right to be placed in possession of the estate. What took place when the late Zamindár died on the 17th July 1864, appears from the Collector's letter to the Court of Wards reporting the death, the Proceedings of the Court and

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the Government order thereon (Exhibit P.). The Collector's report mentioned the surviving relations and the receipt of a petition from the Zamindár, just before his death, asking the recognition of his minor brother as his successor, and his cousin as manager during his minority. That he had enquired and ascertained it to be the wishes of the widows that their deceased husband's desire should be complied with, subject to the 1st widow's having a control over the management. The Government, adopting the opinion expressed in the Proceedings of the Court, ordered that as the brother appeared to be the legal heir, he should be recognized and the estate taken charge of by the Collector as Agent of the Court, and that the Collector should report further as to the management.

These are all the acts and circumstances advanced to prove that the right of succession was conditional upon the will of the Government, and had their combined effect been to show an order applied for and made on each occasion, granting or confirming the right of succession, it would have been meagre evidence of such a condition, in the face of the adverse improbability arising from the non-production of any evidence of Government interference with a succession before 1854. But, in our opinion, such is not their effect. We think the proceedings on the late Zamindár's succession prove nothing more than that after the principal revenue officers of the Government had ascertained on due enquiry that he was the next legal heir, the Government, in a formal manner, recognized him as by that right entitled to be inducted to the possession and enjoyment of the estate. We think, too, that no further evidence is afforded by the proceedings on the death of the late Zamindár, in regard to the succession of the present defendant. We do not see that the mention in the Collector's report of the wishes of the widows having been ascertained adds anything on this point. It had reference, no doubt, to the control to be exercised in regard to the management of the property during the defendants' minority, and such a control, by Regulation V of 1804, was a duty imposed on the devolution of property by inheritance. In short, we consider the acts done on both occasions to amount simply

to the render of a kind of fealty to the Government as supreme lord, and the official recognition, in return, of the renderer's right to be inducted to the poliem as the person ascertained by the Government to be the next heir in the line of legal succession to the deceased holder: just such a submission and recognition as takes place commonly on the succession of heirs to permanently settled Zamindáris.

In support of this conclusion, we are glad to have proof of the very satisfactory kind presented by the minutes of the members of the Revenue Board (Exhibit 12), which we learned, during the argument, had unwittingly been put within reach of the appellant. They appear to have been recorded in August 1864, with reference to the Collector's letter regarding the defendant's succession, and, in distinct terms, express that no legal sanction was considered to exist for the recognition of any one as proprietor, in succession to the deceased Poligár, who was not the actual heir at law; and that on that ground, and on the understanding that the poliem was undivided, the defendant was entitled to the recognition of the Government as the rightful heir to his uncle, the deceased Poligár. It is evident that had he not been considered the legal heir, the senior widow (present plaintiff) would, as the next heir, have been the recognized owner.

Upon the whole, we are of opinion that it has been established as strongly as a claim of this nature can be expected to be proved, that the poliem in dispute is an ancestral hereditary estate which has devolved through several generations in the ordinary course of legal succession. Almost every thing tending to this conclusion that could reasonably be looked for, it seems to us, exists, save the grant of a sannad under Regulation XXV of 1802, and that is not, in our judgment, made by law indispensable, except to render the revenue assessment permanent. It follows that the right of succession contested in the present suit depends upon the question raised by the second issue in the suit, whether the 2nd defendant is the legitimate brother of the late Poligár Tirumalai Puchaya Naikar. If so, he is the rightful heir to all the property claimed in the plaint—no division having taken place between him and his deceased

1871. April 26. R. A. No. 129 of 1869. brother. But if illegitimate, he has no right to any portion of it. No additional issue is necessary. We wish it to be distinctly understood that it is not intended, by any thing said in this judgment, to indicate any opinion as to the right of the Government to alter the assessments of peshkash on this, or other poliems, not held under an Istimrárí sannad, if they think it equitable to do so, and have not bound themselves not to do so, an obligation which it seems from Exhibit 23 does in some instances exist. The question of the 1st defendant's legitimacy we are not now in a position to determine, and, if the plaintiff persists in her denial of it, the issue must be sent for trial by the Court below. She must be required to state, within three weeks, whether she abandons the issue or desires to have it tried.

Appellate Jurisdiction. (a)

Regular Appeal No. 1 *of* 1871.

TRANQUEBAR SA'MI A'YYAN................*Appellant.*
NATHAMBEDU AMMAI AMMA'L..............*Respondent.*

Suit by executrix to recover under deeds of mortgage and sale, dated respectively October 1837 and April 1840, executed to the testator by 1st defendant's deceased husband, certain villages which 1st defendant, in 1848 and 1851, mortgaged to 2nd and 3rd defendants. Plea, the Act of Limitations. For the plaintiff it was contended that the operation of the Limitation Act was suspended from 1844 until 1867, by reason of the pendency of an Equity Suit, commenced by bill filed by present 1st defendant against the testator, to set aside the deeds of October 1837 and April 1840, which bill was dismissed by consent in June 1867. *Held,* (reversing the decision of the Lower Court) that these proceedings had no such effect, that plaintiff might have brought ejectment at any time and that the present suit was barred.

1871. April 24. R. A. No. 1 of 1871. THIS was a Regular Appeal against the decree of C. R. Pelly, the Acting Civil Judge of Tranquebar, in Original Suit No. 4 of 1868.

The plaintiff as executrix and sister with probate of the last Will and Testament of one Manali Latchmana Mudali, deceased, sued to recover, under deeds of mortgage and sale, dated respectively 7th October 1837 and 18th

(a) Present :—Holloway and Innes, J. J.

April 1840, that purported to have been executed in his favor by 1st defendant's deceased husband, one Manali Muttukistna Mudali, the villages of Pedda Kokúr and Chinna Kokúr in the Myaveram Taluq, which the 1st defendant in 1848 and 1851, fraudulently, as plaintiff alleged, mortgaged to the 2nd and 3rd defendants, together with mesne profits from 1852 to 1867, the aggregate value of the claim being Rupees 1,40,498-6-6. The 1st defendant allowed the suit to proceed *ex-parte*, the 2nd denied the genuineness of the deeds of mortgage and sale sued on, and pleaded that the villages in question were first mortgaged and afterwards, viz., on the 25th June 1856, by two different documents, sold to him and 3rd defendant with mirás registry; and that the suit was barred by the Law of Limitations, plaintiff's cause of action having accrued in 1840.

Four issues were framed, one of which was.—

Whether the suit is barred by the Law of Limitations.

The plaintiff relied on the proceedings in an Equity Suit carried on in the Supreme Court of Madras (and afterwards in the High Court) and commenced by Bill filed in 1844 by Tripura Súndra Ammál (the first defendant in the present case) against Manali Latchmana Mudali, alleging that Muttukistna Mudali, husband of the said Tripura Súndra Ammál and undivided brother of the said Latchmana Mudali, became of weak mind, and that the said Latchmana Mudali, taking undue advantage of this, obtained from the said Muttukistna Mudali, amongst other deeds, in 1837, a mortgage deed and a warrant of Attorney, and in June 1840 a bill of sale of certain villages of which Pedda and Chinna Kokúr were two, and praying that these deeds be declared cancelled and null and void. Proceedings were continued in the suit until June 1867, when the bill was dismissed by consent, and it was in the present case argued that the pendency of those proceedings prevented the operation of the Limitation Act.

The Lower Court being of this opinion, gave judgment for the plaintiff. The second defendant appealed.

1871. April 24. R. A. No. 1 of 1871.

The *Acting Advocate General* for the appellant contended that the Act of Limitations barred the action. The Civil Judge in his judgment (para. 13) holds that the Bill in Equity suspended the operation of the Law of Limitations, but it had not any such effect. There were also certain proceedings taken by the plaintiff in the Revenue Courts, but he was referred to a Civil Suit, so that they amounted to nothing. The equity proceedings which are relied upon as taking this case out of the Act are, shortly,—In 1844, Tripura Sundra Ammál, the 1st defendant, filed a bill in the Supreme Court against Latchmana Mudali, praying to be declared solely entitled to all her late husband's property and seeking to set aside the mortgage and sales to us as fraudulent and void. In March 1847 a replication was filed. In October 1851, an order was made for the translation of certain documents. In January 1852, Latchmana Mudali having died, the suit was continued by bill of revivor filed by the present 1st defendant. In 1853 an answer to the revived bill was filed. A replication to this bill was filed on the 10th March 1860, and the bill was finally dismissed by consent without costs in March 1867. There was nothing in these proceedings to take the case out of the Limitation Act. The Civil Judge says (para. 13) that "the right and "title to the two villages was in issue in the suit pending "in the Supreme Court between 1st defendant and Latch-"mana Mudali, and plaintiff: so long as it remained unad-"judicated upon, he and plaintiff were powerless to interfere "with the second and third defendants; any action they "might have instituted in another Court to oust these mort-"gagees would have been thrown out on the ground that it "involved the question of title, which was pending before a "competent Court, and that they must consequently await "the result." It is difficult to see how this could have been said, for the plaintiff could not have got possession by any decree that might have been made in the Equity Suit.

O'Sullivan (with him *Ráma Rán*) for the respondent contended that the Act of Limitations did not apply to the case. The proceedings in Equity took the case out of its operation. The general rule of *lis pendens* applied. That rule is

laid down in *Bellamy* v. *Sabine*, 1 De. G. & J. 566. Had there been a decree in the Equity Suit, any alienation made *pendente lite* would have been invalid: and the withdrawal of the suit by the plaintiff, it is submitted, has the same effect. The order of the Court permitting that withdrawal is, for the present purpose, equivalent to a decree in favor of defendant.

1871. *April* 24. *R. A. No.* 1 *of* 1871.

[HOLLOWAY, J.—In order to show that the Act ought not to run you must show invalidity. I look upon it as a dry legal question. Mr. O'Sullivan's client is barred, unless he can show that he falls under some of the exceptions.]

The Act of Limitations was never intended to have the effect sought to be given it by the other side. It was framed by lawyers acquainted with the doctrine of *lis pendens*. There is no legal obligation on a party defending in a suit to commence proceedings against alienees of the opposite party, made so *pendente lite*. Otherwise, in many cases, there would be endless litigation.

The Court delivered the following judgments :—

HOLLOWAY, J.—The short question, is whether the pendency of the Equity Suit from 1844 to 1867 prevents the application of the Statute during the period of its pendency. On the face of plaintiff's case it is obvious that it has been long barred, unless this effect can be attributed to those proceedings.

The first defendant was the plaintiff and the person represented by the plaintiff was defendant in that suit, and its object was to set aside, as fraudulent, upon equitable grounds, the transactions by which these two, with other villages, were acquired.

Now if the positions had been reversed, Latchmana, on grounds formally legal, kept out of possession, and had finally acquired the right by the suit on equitable grounds, it might well have been argued that, on the doctrine of *Bond* v. *Hopkins* (1 Sch. & Lef. 414), the time ought not to be reckoned. If, again, the Equity Court had providently, or improvidently, restrained the plaintiff from proceeding at law, on the principle applied in *O'Brien* v. *Osborne* (10

1871. April 24. R. A. No. 1 of 1871.

Hare, 92) the Court might well have said that the Statute did not apply. Here, however, there is nothing of the kind. The action of ejectment could have been brought at any moment, and the Statute ran from the date of the hostile possession.

The doctrine of *lis pendens* is, simply, that parties bound by the litigation cannot alter the object of it so as to withdraw it from the decree made in the suit. It by no means implies that, upon the instant of a question being raised, the parties are compelled to quiescence until its determination. So far is this from being the case, that, unless the question involved in the litigation will, when decided in a particular manner, render a title insecure, *lis pendens* is not even an answer to a bill for specific performance (*Bull* v. *Hutchins*, 32 Beav. 615).

The case of *Bellamy* v. *Sabine* and the maxim of the Canon Law, of the application of which it is an example, were considered in *Seth Sam's Case*(a): it has absolutely nothing to do with the question. *Agere non valenti non currit praescriptio* is the only principle on which the plaintiff could be held not barred.

It is manifest, from the very existence of the Equity Suit, that the legal title was vested in the person whom the plaintiff represents. He might have brought his action at any time; he never did, and that this legal title was being impeached upon equitable grounds has no bearing upon the question, and cannot take the case out of the Statute.

On this short ground we reverse the decision of the Civil Judge and dismiss the original suit with costs.

INNES, J.—Agreeing, as I do, in this judgment, I would merely add that the cause of action in the one suit was not the same as that in the other, and that, thus, there is wanting one of the pre-requisites to the application of the rule in Section 14 of the Limitation Act, as to deduction of time during the pendency of litigation.

Appeal allowed.

(a) Reported at page 75 of this Volume.

Appellate Jurisdiction. (a)

Special Appeals Nos. 515 and 582 *of* 1869.

MA'HA'SINGAVASTHA A'YYAR, and another.........	*Special Appellants in No.* 515. *Special Respondents in No.* 582.
A. GOPA'LA A'YYAN, and 21 others......................	*Special Respondents in No.* 515.
A. GOPA'LA A'YYAN, and 15 others......................	*Special Appellants in No.* 582.

The provision in Madras Act VIII of 1865, Section 11, Rule 3,—"And when such usage is not clearly ascertainable, then according to the rates established or paid for neighbouring lands of similar description and quality"—does not admit of rates of rent being determined on an average of varying rates paid for neighbouring lands; but it does not require, for determination of the proper rate of rent for particular lands, the existence of a fixed general rate of rent for neighbouring lands of similar description and quality. The words "according to the rates established or paid" import clearly the power to determine the rate of rent in accordance with either the general rate at which neighbouring lands of a similar kind are let, or, where the rents of such lands vary, the rate at which rents had for any time been actually paid by some of the tenants of such lands.

THESE were Special Appeals against the decisions of W. M. Cadell, the Acting Civil Judge of Trichinopoly, in Regular Appeals Nos. 10 and 15 of 1868, modifying the decision of the Acting Head Assistant Collector of Trichinopoly in summary Suit No. 3 of 1867. 1871. *May* 29. *S. A. Nos.* 515 & 582 *of* 1869.

Suit No. 3 of 1867 was brought under the provisions of Act VIII of 1865, to arrange the terms and compel the exchange of pattahs and muchalkas between plaintiffs and defendants. The Acting Head Assistant Collector decided that plaintiff should pay tirvai at the rate of Rupees 21-9-4 per káni for garden cultivation, and give varam for nanjah crops.

Against this decision both parties appealed.

The judgment of the Civil Court was as follows :—

"These were cross-appeals from the decision of the late Acting Head Assistant Collector, under Act VIII of 1865, which directed that the defendants should receive pattahs and execute muchalkas to the plaintiffs, according to which the plaintiffs were to receive half varam for nanjah and 21-9-4 per káni for vanpayer or garden cultivation.

(a) Present :—Scotland, C. J. and Innes, J.

1871. May 29. S. A. Nos. 515 & 582 of 1869.

The defendants appeal on the grounds, chiefly, that they should pay a money rent and not varam on nanjah, and should likewise pay the reduced rate per káni of Rupees 11-4-0 for garden cultivation.

The plaintiffs base their appeal on the ground that they are entitled to have varam both on the garden as well as on the nanjah cultivation.

I have carefully considered the record of this case, and am of opinion that, as regards the nanjah, the decision of the Acting Head Assistant Collector is right.

With respect to the rate charged for garden cultivation, I consider, however, that the defendants are entitled to share in the benefits conferred by the Government in the late survey and re-assessment of the district, and as, in the terms on which the inám was given, this right was carefully restricted, there can be no hardship to the plaintiffs, the Inámdárs.

I, therefore, modify the decision of the Acting Head Assistant Collector as regards the garden lands, and direct that the rate fixed for garden tirvai be Rupees 11, or what on examination of the rates paid in surrounding Villages for the same lands may be found to be the exact tirvai on this kind of cultivation."

Plaintiffs and defendants appealed to the High Court, in Special Appeals Nos. 515 and 582, respectively.

The *Acting Advocate General* for the special appellants, the plaintiffs.

Miller and *Parthasarthi A'yyangár* for the special respondents, the defendants.

The Court delivered the following

JUDGMENTS:—*In Special Appeal No.* 515.—This is a Special Appeal arising out of a suit before Mr. Crole, the Acting Head Assistant Collector of Trichinopoly, brought under Madras Act VIII of 1865, to enforce the acceptance of pattahs and the execution of muchalkas stipulating for the payment of a half varam rent for the portions of the lands let to the defendants, kept under ordinary nanjah cultivation and sub-let by the defendants for garden cultivation. The Head Assistant Collector decided that the

proper rents were,—half varam for the land under nanjah cultivation, and Rupees 21-9-4 per káni for the portion cultivated as garden land, and ordered the exchange of pattahs and muchalkas stating these rents. From this decision both the plaintiffs and defendants appealed to the Civil Court, and that Court confirmed it as to the varam rent for the land under nanjah cultivation, but modified it as to the garden land by decreeing that the proper rent was Rupees 11 per káni "or what on examination of the "rates paid in surrounding villages for the same lands may "be found to be the exact tirvai on this kind of cultivation."

The questions raised in the special appeal are, whether a half varam rent for the lands under garden cultivation had been improperly disallowed, and if not, whether the amount fixed by the Head Assistant Collector, or that fixed by the Civil Court, was the proper rent. The informality of the Civil Court's decree and the statements in the Court's judgment showing that its decision rested entirely upon the re-assessment of the District made on behalf of the Government in Fasli 1274, rendered it necessary on the first hearing of the appeal to call upon the Civil Court to return its finding upon the issue :—"What was the proper rate of rent for the "garden lands according to the rates established or paid for "closely neighbouring lands of similar description and quali- "ty."(a) The material parts of the return made to this issue are, that prior to the survey and re-assessment in Fasli 1274, Rupees 21-9-4 was the rate per káni fixed by the Government for nanjah lands under garden cultivation, and this was the rate which the plaintiffs received from the tenants (the defendants), that the rent for this kind of cultivation of Government lands was reduced under a re-assessment in Fasli 1274 to Rupees 11-4-0 per káni, and since that time disputes have continued between the plaintiffs and the defendants, the former claiming a varam rent, *i. e.* half the amount of the rent paid by the under-tenants of the garden land, in accordance with the established custom in the neighbouring inám villages; and the latter insisting on

(a) See 5 M. H. C. Reps. 425.

1871. May 29. S. A. Nos. 515 & 582 of 1869.

their claim to have the benefit of the reduction which had been conceded to the Government ryots:—that the only rates of rent established for garden cultivation in this village were those established by Government and paid by the defendants prior to Fasli 1274, viz. Rupees 21-9-4 per káni; and that, since Fasli 1274, the rate of Rupees 11-4-0 has been established by Government, but rent at this rate the plaintiffs have always refused to receive.

It has been urged, on behalf of the appellants, that these conclusions, when considered with the evidence upon which they rest, cannot be accepted as a finding of any fixed general rate of rent established or paid within the village in question for garden lands, either prior or subsequent to Fasli 1274; and that the plaintiffs ought, therefore, to be allowed the varam rent payable for lands of a similar description by the undoubtedly established custom of the neighbouring villages.

We think this argument is right as to the effect to be given to the conclusions of the Civil Court. It appears that the smaller portion of the village lands is held by Government ryots, and that the plaintiffs and 9 other inámdárs are the proprietors of the rest of the lands, and there is, certainly, no evidence of any general acknowledgment or payment of rent at the rate of Rupees 21-9-4 per káni, prior to Fasli 1274, except by the ryots of the Government. The Karnam of the village appears to have been the single witness examined touching this point, and his evidence is to the effect that, before Fasli 1274, two out of the ten inámdárs accepted the Government rate of Rupees 21-9-4, and to the others rents were paid at four or five different rates, varying from Rupees 27½ to Rupees 19 per 1 káni and 30 valies; and, as to the period since Fasli 1274, the finding of the Civil Court shows the effect of his evidence.

The return therefore, must, we agree, be taken as a finding against the existence of either a local usage as to the rate of rent for lands under garden cultivation, or any certain general rate established or paid for lands of similar description and quality.

1871. May 29. S. A. Nos. 515 & 582 of 1869.

But it does not, we think, follow that the plaintiffs are, upon such finding, entitled to more than the amount of rent fixed by the Civil Court.

The point for consideration is the applicability of the provision in Madras Act VIII of 1865, Section 11, Rule 3,— "and when such usage is not clearly ascertainable, then "according to the rates established or paid for neighbouring "lands of similar description and quality," and the provisions which follow it in Rule 3,—for, no doubt, the finding and the admitted fact that the first survey of the lands in question took place in 1859, render the preceding provisions of the Section inapplicable. In our opinion that provision does not admit (as was said in the course of the argument) of rates of rent being determined on an average of varying rates paid for neighbouring lands; but it does not, it appears to us, require for the determination of the proper rate of rent for particular lands, the existence of a fixed general rate of rent for neighbouring lands of similar description and quality. The words "according to the rates established or paid" import clearly, we think, the power to determine the rate of rent in accordance with either the general rate at which neighbouring lands of a similar kind are let, or, where the rents of such lands vary, the rate at which rents had for any time been actually paid by some of the tenants of such lands: and the proviso which follows, making it optional for either party to decline being bound by the rate determined, indicates strongly that the language of the provision was intended to have its full meaning and effect.

Upon this construction we are of opinion that enough is shown by the finding to support the power of the Civil Court to fix the rate of rent at Rs. 11-4 per káni; that being the rate paid for the neighbouring lands of the Government of similar description and quality. But, as the case now stands, the decree of that Court cannot be affirmed. The plaintiffs having objected to be bound by it and claimed rent according to the varam rate, the case is brought within the proviso—"that if either party be dissatisfied with the rates "so determined, he may claim that the rent be discharged "in kind according to "the varam," that is, according to the "established rate of the village for dividing the crop be-

1871. May 29. S. A. Nos. 515 & 582 of 1869.

" tween the Government, or the landlord and the cultivator. " When the varam cannot be ascertained, such rates shall be " decreed as may appear just to the Collector after ascertain- " ing if any increase in the value of the produce or in the " productive power of the land has taken place, otherwise " than by the agency or at the expense of the ryot."

This provision clearly applies to a case of dissatisfaction with respect to rates of rent in villages in which no varam capable of application can be ascertained: and as, in the present case, it is shown by the finding that there is no varam rate of rent known in the village for lands under garden cultivation by sub-tenants, we think the case is within the last member of the proviso, and, consequently, that the Civil Court should be required to return a further finding on the following issue.—

Looking to the rents hitherto paid to the inámdárs and the present circumstances connected with the letting and cultivation of garden lands, what is the fair and just rate of rent for the garden lands sub-let for garden cultivation by the defendants?

In *Special Appeal* 582 *of* 1869.—We are of opinion that there is no ground for disturbing the decision of the Court below as to the rate of rent fixed for the nanjah land—And with respect to the question whether the proper rate of rent has been fixed for the portion of land underlet by the appellants for garden cultivation, the judgment in the cross *Special Appeal* 515 *of* 1869, is decisive, and in accordance therewith the final decree in this appeal must abide the finding of the Civil Court on the issue directed.

Issue directed.

Appellate Jurisdiction (a)

Special Appeal No. 195 *of* 1870.

MA'HA'LATCHMI AMMA'L...............*Special Appellant.*

PALANI CHETTI and 3 others.........*Special Respondents.*

Suit to eject defendants (who held under a lease, Exhibit A.) from a house-ground and to compel them to remove the buildings thereon erected. The defendants pleaded that A. was a permanent lease and that plaintiff had no right to eject. The lease, A, expressly authorized the lessee to build. The Court of First Instance, holding that A. was not a permanent lease, decreed as sued for. The Appellate Court, while concurring with the Munsif as to the construction of A., gave to the plaintiff the option of paying for the house and resuming the land, or of receiving the value of the land from the defendant. *Held*, that the decree of the Principal Sadr Amín was right.

Muttukaruppa Kaundan v. *Ráma Pillai*, 3 M. H. C. 158, applies to the defendant's admission of a transaction embodied in a written document not receivable in evidence, and is no authority whatever for construing a document present to the Court upon a defendant's admission.

1871. *May* 30. *S. A. No.* 195 *of* 1870.

THIS was a Special Appeal against the decision of T. Kristnasámi A'yyar, the Principal Sadr Amín of Tanjore, in Regular Appeal No. 258 of 1869, modifying the decree of the Court of the District Munsif of Combaconum in Original Suit No. 639 of 1865.

Plaintiff sued to eject the defendants from a house-ground rented out by her to one Vaidi Chetti, an undivided member of the defendant's family, under a lease bond (exhibit A) dated the 22nd November 1844. Plaintiff also prayed that the defendants be compelled to remove the buildings which had been erected on the house-ground in question, and which she valued at Rs. 210. The defendants admitted the document A., but contended that under the terms thereof, the plaintiff had merely a right to rent and could not eject. They also stated that the buildings were worth Rs. 1,000. By the terms of A. the lessee was authorized to build on the ground. The Munsif held that A was not a permanent lease, and remarking on the contention of the defendants' Vakíl that there was an alteration in A. whereby the figure 1 had been substituted for 60, said "even supposing that this alteration was made fraudulently by the plaintiff and that it vitiates the rent-deed entirely, I can see no reason why I should not give a decree in favor of plaintiff on the mere admission of the defendants, who have said that the lease had no term fixed

(a) Present :—Holloway and Innes, J. J.

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for it, such admission being as much original evidence as the said lease. Vide *Referred Case No.* 10 *of* 1866, 3 M. H. C. Reps. 158." He therefore decreed that the defendants should remove the buildings and restore the land sued for to plaintiff with arrears of rent.

On appeal the Principal Sadr Amín confirmed the decision of the Munsif as to the construction of the lease A, but in modification of his decree said " Equity and common sense alike compel me to pronounce that the defendants are entitled either to have the value of the building erected on the house-ground, and which is estimated by the Commissioner deputed by the Lower Court at Rs. 575, paid to them before being evicted, or, at the option of the plaintiff (the person causing the eviction), to purchase her interest in the ground at the value thereof as laid down in the plaint, irrespective of the value of the building. A decree of the above nature seems also conformable to the spirit of Section 2, Act XI of 1865."

Plaintiff preferred a special appeal.

R. Báláji Rau, for *Savundranáyagam Pillai*, for the special appellant, the plaintiff.

The Court delivered the following judgments,

HOLLOWAY, J.—In this case a lessee has been ejected from a parcel of land upon which he had built a house worth Rupees 575. The defendant below contended that the lease should be construed as giving a right of permanent occupation. The Munsif decreed restoration with arrears of rent. The Principal Sadr Amín, while agreeing with him that the lease did not give a right of permanent occupation, gave to the plaintiff the option of paying for the house and resuming the land, or of receiving the value of the land from the defendant.

The case at 3 M. H. C. 158 has been misapplied by the Munsif. That case applied to the defendant's admission of a transaction embodied in a written document not receivable in evidence, and is no authority whatever for construing a document, present to the Court, upon a defendant's admission. The construction of a document before the Court was a question of law to be determined by Grammar and Logic,

the primary organs of interpretation, aided, where necessary, by the subsidiary one of usage, where admissible to throw light upon the meaning of the words used.

The Principal Sadr Amín put the same construction upon the document, and the defendant has not appeared to contest that construction. In basing the judgment upon what is termed the spirit of Act XI of 1865, a canon of interpretation has been violated. Section 3 of the Act strictly limits the application to cases governed by English law. The Act is, therefore, a "ius singulare" which admits of no extension by analogy. Equity, too, had nothing to do with the construction to be put upon the instrument. Its office can only be to modify the natural results of the meaning, in consequence of considerations external to the instrument itself and based upon the conduct of the party against whom such relief is sought. While, however, compelled to dissent from the course of reasoning of the Lower Courts, I am of opinion that the decree should be upheld, and upon the circumstances of this transaction. A piece of land of small value is granted as a house site. The resumption of such land at all is most uncommon; the general understanding is that the holding shall be in perpetuity at the fixed rent. The contract being in writing we are not at liberty to say that the tenancy is to endure beyond the term expressly fixed, but, following many cases, we are at liberty to say that the resumption shall be only upon the terms of the lessor compensating for the permanent improvements upon the land, and we are certainly not at liberty to say that in so deciding the Principal Sadr Amín is wrong. I am of opinion that the appeal should be dismissed.

INNES, J.—Plaintiff lets the land to defendant by an instrument in which it is expressly permitted him to erect permanent buildings. This instrument has been construed as a lease from year to year, and that construction has not been disputed in special appeal. It must, therefore, be taken to be what it has been found to be. But it is clear that it could not have been the intention of the parties that, after defendant had gone to the outlay contemplated by the agreement of the parties, plaintiff should be at liberty to treat this as a lease from year to year and nothing more, and to eject de-

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fendant at any yearly term, with the almost total loss of the advantage to be derived from the money he has been induced, under the agreement, to lay out. For, if this were so, all that defendant could do would be to pull his house to pieces and remove the materials, which would not, of course, realize anything like the value of the building.

I think, therefore, that the decision of the Principal Sadr Amín is in accordance with principle in decreeing that plaintiff, before ejecting defendant, must pay the value of the buildings.

I agree in dismissing this Special Appeal.

Appellate Jurisdiction. (a)

Special Appeal No. 27 *of* 1871.

KRISTNA MUDALI....................*Special Appellant.*

SHANMUGA MUDALIAR...............*Special Respondent.*

Plaintiff sued, as managing trustee of a choultry, to set aside certain mortgages of the lands with which it was endowed, made by the 2nd, 3rd and 4th defendants to the 6th and 7th defendants, and for an injunction to compel payment of kist, which had been allowed to fall into arrears, contrary to the provisions of Exhibit A, the muchalka sued upon. The defendants pleaded that the mortgages made were not in violation of the provisions of Exhibit A. The Court of First Instance dismissed the suit. On appeal, the Civil Judge considered the provisions in Exhibit A—"Moreover, we are only entitled to cultivate the said four villages and to maintain the said choultry with the income therefrom as above stated; and we have no right to alienate the said lands by sale, &c."—fatal to the right to mortgage advanced by defendants 1 to 5. Accordingly he reversed the decree appealed from.

Held, by SCOTLAND, C. J.—That the reasonable construction to be put upon that portion of the rázináma relating to alienation was that the villages were not to be alienated so as to deprive the choultry of the receipt of the portion of the produce fixed by the rázináma for its support. That the security of the cultivation of the land and the application of the fixed portion of the produce to the maintenance of the choultry was all that the parties intended to effect. That there was nothing in the record to show that the payment of that fixed portion had been rendered less certain by the transfer of the villages to the mortgagees. That, consequently, the beneficial interest of the plaintiff, as trustee under the rázináma, was not impaired, and the mortgages were not made in violation of the provisions of Exhibit A.

By HOLLOWAY, J.—That the right set up was based upon a purely capricious exercise of the plaintiff's will, in the effectuation of which he had no conceivable interest: that contractual words seeking to create a right of this sort are ineffective to create it, and that, consequently, the alienations by mortgage were wrongly declared void.

1871. June 7. S. A. No. 27 of 1871.

THIS was a Special Appeal against the decision of C. R. Pelly, the Acting Civil Judge of Tranquebar, in Regular Appeal No. 71 of 1870, reversing the Decree of the Judge of the Court of Small Causes at Negapatam, on the Principal Sadr Amín's Side, in Original Suit No. 85 of 1869.

(a) Present:—Scotland, C. J. and Holloway, J.

1871. June 7. S. A. No. 27 of 1871.

Plaintiff, as managing trustee of the Peruvastan choultry, sued to set aside certain alienations of the lands with which it was endowed, made by 2nd, 3rd and 4th defendants to 6th and 7th defendants, and for an injunction, under Section 93 of the Civil Procedure Code, to compel payment of the Sirkar kist, which they had allowed to fall in arrears contrary to the conditions of Exhibit A, a muchalka, dated the 8th March 1846, and the decree in Original Suit 19 of 1864, on the file of the Principal Sadr Amín of Negapatam. 1st defendant allowed the suit to proceed *ex-parte.* 2nd, 3rd and 4th pleaded, amongst other pleas, that a simple mortgage to third parties was not opposed to the muchalka, or detrimental to the institution and payment of the kist. 6th and 7th defendants upheld the mortgages to themselves and stated that no kist was due. The Lower Court dismissed the suit, and the plaintiff appealed.

The judgment of the Civil Judge was, in part, as follows:—

" The case stands thus :—The ancestors of plaintiff and defendants 1 to 5 assigned the lands of the villages Nedumbalam, Manikal, Chettiarcorichi, and Serukalatur for the support of the choultry in question. In 1819, an arrangement was made, by which the management of the charity was vested in one Rámalinga Mudali, plaintiff's uncle; and on his death, about 35 years ago, he was succeeded by plaintiff's father, one Paramésivara Mudali, who had exclusive management of the two villages Chettiarcorichi and Serukalatur, while, as regards the other two, he held one moiety, and the other parties the remaining one. Disputes then arose, when the Revenue authorities attached the lands for arrears due to Government, and the matter resulted in plaintiff's elder brother and his co-parceners, the father of 1st defendant, and the father of 3rd, 4th and 5th defendants executing Exhibit A, the muchalka in question. This was in 1846. Matters continued thus for a time, when differences again arose, and the lands were a second time attached by the Revenue authorities, and so held by them for some years, but eventually released under the muchalka, Exhibit B, which was signed by the parties to Exhibit A, with a single exception, viz., Sámi Mudali, a brother of plaintiff,

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for whom he signed; and by this document they bound themselves to adhere to the terms of Exhibit A. Disputes, however, again arose, and in 1864, plaintiff sued the other parties in the Court of the Principal Sadr Amín of Negapatam (Original Suit 19 of 1864) for the lands and produce from 1854 to 1862, alleging that they had alienated a portion of the lands and failed to deliver the choultry's share of the produce. The Principal Sadr Amín then decreed plaintiff the produce from 1859 to 1863, was silent relative to the lands, but in the 24th para. of the judgment, wrote thus:—"As the Court has held that the charity has not ceased, it seems to follow necessarily that the villages allotted for its support cannot be alienated, and that any alienation of the allotted property is further opposed to the express stipulation in muchalka A, by which the Court considers the subscribing parties are bound." This judgment was passed on the 30th September 1865; and on the 16th September, 6th and 8th November 1868, and 15th May 1869, the 2nd, 3rd and 5th defendants raised Rupees 7,350 on four bonds executed in favor of 6th and 7th defendants, mortgaging portions of the lands, and plaintiff consequently instituted the suit now under consideration to have these bonds set aside as alienations barred by the muchalka A; and, further, to have defendants 1 to 5 compelled by an injunction, under Section 93, to pay the kist allowed to fall into arrears, consequent on which the Revenue authorities have again attached a portion of the lands held by them. The Principal Sadr Amín, however, held the mortgages not to be such alienations as he contemplated in the above para., and hence this appeal.

The points for determination in this appeal are, 1st, whether with regard to the terms of Exhibits A and B, and the nature of the mortgages under D, E, F and No. II, the latter constitute such alienations as are barred by Exhibit A; and 2nd, if so, whether plaintiff is entitled to a perpetual injunction under Section 93 of the Code of Civil Procedure.

Exhibit A sets forth as follows—"In support of the choultry founded by our ancestors in the Peruvalundan

alias Jahal village. our mirási grain-rent villages of Nedumbalam, Manaikul, Serukalatur and Chethiarcorichi were set apart by us. The villages of Serukalatur and Chethiarcorichi were held in common, and the lands of the other two villages, Nedumbalam and Manikal, were held, half by Paramésivara Mudali, and the other half by Subba Mudali, &c. three persons. With the income of the two first mentioned villages and with the mirásiwaram paid by the holders of the said two moieties, the deceased Paramésivara Mudali was maintaining the charity. Subba Mudaliar and others having refused payment of the mirásiwaram unless the accounts of receipts and expenses of the charity were rendered to them, and the said Paramésivara Mudali having on the other hand refused to render such accounts, the moiety of lands held by Subba Mudaliar, &c. in Nedumbalam and Manikal were attached and placed in charge of the Sircar, by whom the produce has been estimated and cut. Now, however, the disputes among us have been ended by the following amicable adjustment, that is to say :—

That of the four villages of Nedumbalam, Manikal, Serukalatur and Chethiarcorichi set apart in common for the support of the said charitable object (choultry), the lands of Serukalatur and Chethiarcorichi should be cultivated by the said Paramésivara Mudali's son, Sámi Mudaliar, who should appropriate the mirásiwaram (after paying the kudiwaram and mélwaram from the produce) for the charity. From the gross produce of the remaining two villages of Nedumbalam and Manikal, the mélwaram or the Sircar share and the kudiwaram or the ryot's share are to be deducted, and after paying out of the mirásiwaram the kaul fees due to Sircar, the net mirásiwaram 253¼ kallams of paddy are to be paid for the support of said charity—thus $126\frac{7}{18}$ kallams by Sámi Mudaliar, who should cultivate a moiety of the lands in the said two villages and $126\frac{7}{18}$ kallams by the said Subba Mudaliar, &c., the three persons who should cultivate the other moiety of lands in the said two villages. With the funds so paid, Paramésivara Mudaliar's son Sami Mudaliar should, as usual, keep up the choultry efficiently, and should not appropriate said funds to his personal use. As the lands of Subba Mudaliar, &c., are under zaft by Sircar from Fasli

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1247, no kudimaramut, such as strengthening the banks of fields, digging nullahs, &c., has been executed in respect of those lands, and it is now to be carried out with the mirás tundwaram for Fasli 1254, which is in the hands of the said Subba Mudaliar. The mirásiwaram, or landlord's share, amounting to Rupees 198-2-11 up to Fasli 1253, is in deposit with the Sircar, and it is to be drawn by Vadapadymungalum Sokkappa Mudaliar, who should expend it on the repairs of the choultry. As we have thus adjusted the differences between us, we bind ourselves to abide by the above adjustment in future. We pray for an order to pay the said Rupees 198-2-11 now in Sircar deposit to the said Vadapadymungalum Sokkappa Mudaliar, and to release from attachment the lands of Subba Mudaliar and others. Moreover, we are only entitled to cultivate the said four villages and to maintain the said choultry with the income therefrom as above stated; and we have no right to alienate the said lands by sale, &c. Such is the muchalka given with our free-will."

I deem the following passages fatal to the right to mortgage advanced by defendants 1 to 5, viz. "Moreover we are only entitled to cultivate" and "we have no right to alienate the said lands by sale, &c.," in the vernacular கிரயவிக்கிரய முதலானது. The above clearly sets forth that they "are only" entitled to cultivate, while on reference to Exhibits D, E, F and No. II, I find them to be in effect very little short of sales. D is an usufructuary mortgage for the large sum of Rupees 2,500 on 7 V. 2 M. 41⅞ G. of dry, wet and other lands. E is a similar document for 1,250 Rupees on 3 V. 13 M. 49½ G. F. the same for Rupees 2,350 on 7 V. 1 M. 7 G. and No. II, the same for Rupees 1,250 on 3 V. 13 M. 86 G.; and unless the mortgagors think fit to refund the above sums, the mortgagees may continue to hold for any number of years; and taking into consideration that Exhibit A, to which the mortgagors were admittedly parties, "only" gives them the right to cultivate, the above to my view will fall within the scope of the alienations which may reasonably be presumed to be included in the term "etcetera," which thus following the word

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"sale" not improbably primarily contemplated an alienation of this very nature.

It has been contended that as the above exhibits provide for payment to the choultry of its share, they can entail no injury on the institution. This, however, even admitting it to be material when there is a written document to be construed, is very questionable. So long as the lands continue under the management and in the possession of the parties to Exhibit A, the descendants of the grantees, payment of the kist and recovery of the produce may be easily enforced. Affairs, however, will be in a very different position if they are allowed to pass into the hands of mortgagees who may sub-mortgage, or, by letting the kist fall into arrears, entail sale on the part of Government, and so sub-division among any number of purchasers; and I am of opinion that when Exhibit A, by which defendants 1 to 5 are admittedly bound, clearly limits their right to cultivation, usufructuary mortgages of the above nature will constitute alienations prejudicial to the interests of the institution."

The Civil Judge, accordingly, reversed the decree of the Principal Sadr Amín and granted the injunction prayed for.

The 6th defendant preferred a special appeal on the grounds, amongst others, that

The Civil Judge misconstrued Exhibit A and the judgment in Suit No. 19 of 1864, and that the disputed alienation did not affect the charity.

The *Acting Advocate General* for the special appellant, the 6th defendant.

O'Sullivan and *Sanjiva Rau* for the special respondent, the plaintiff.

The Court delivered the following judgments:—

SCOTLAND, C. J.—I am of opinion that the only substantial question open for determination in this suit was whether the mortgages mentioned in the plaint were made in violation of the rázináma (Exhibit A) and therefore invalid: and considering the question as one of construction merely, I think the mortgages are not invalid. The reasonable construction which it seems to me the Court is bound to put

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upon the portion of the rázináma relating to alienation, is that the villages were not to be alienated so as to deprive the choultry of the receipt of the portion of the produce fixed by the rázináma for its support out of the returns from the regular cultivation of the land of the villages. The contrary strictly literal construction upheld by the Civil Court would prevent even a beneficial lease of any portion of the land to a tenant for cultivation, and it is hardly possible to suppose that the parties intended the stipulation to have such an effect. Reading the stipulation together with the other provisions in the rázináma, I think the security of the cultivation of the land and the application of the fixed portion of the produce to the maintenance of the choultry is all that the parties can be considered to have intended to effect by it.

Upon this construction the mortgages were not made in violation of the stipulation, for they contain express provisions binding the mortgagees to pay the fixed portion of the produce for the support of the choultry, and there is nothing in the record to show that the regular cultivation of the land and the payment of that portion have been rendered less certain by the transfer of the villages to the mortgagees. Consequently, the beneficial interest of the plaintiff as trustee under the rázináma is not impaired. Upon this ground, I think that the decree of the Lower Appellate Court is not sustainable and must be reversed.

With respect to the further question raised on behalf of the respondent, whether the plaintiff possessed a proprietary right as trustee of the choultry, independently of the rázináma, which entitled him to invalidate the mortgages, I abstain from giving any opinion, considering the question at variance with the cause of action in the present suit. If not concluded by the decision in the former suit, brought by the respondent in 1864, the plaintiff may, if so advised, litigate it in another properly framed suit.

Holloway, J.—The question here is whether the Judge has rightly cancelled these alienations on the ground that they are opposed to the words of the rázináma on which the suit is brought. The question is strictly the only one

which the plaintiff raised, and the only one which the Court determined.

1871. *June* 7. S. A. *No.* 27 *of* 1871.

It was attempted by Mr. O'Sullivan to bring in the larger question of whether the endowment was not entitled to the whole of the produce, and not merely to the 250 kallams which the agreement declares payable. That would depend upon questions altogether beyond the scope of this suit. The agreement may itself be a fraud upon the institution, but the only question here is whether, assuming it to be valid, these alienations by mortgage can be set aside. It is not disputed that the whole sum which the agreement secures to the Pagoda is secured by the mortgage, and nothing was adduced to show that the security for payment was smaller (it appears to be rather greater), or that the transaction in any way worsened the condition of the institution as settled by the rázináma. No one, therefore, having the least interest, so far as the present case discloses, in the continued personal occupation of the mortgagors, ought the contractual words to be allowed to upset an alienation of this kind? Attached to the right of occupation by the general principles of law, is the right of dealing as the defendants have dealt. Within certain limits the contract of private persons may modify the operation of rules of law, but, without considering at the present moment whether this is a principle susceptible of such modification, I put my judgment upon the broad ground that every right capable of being enforced must have for its contents some conceivable human interest, but not necessarily a pecuniary one. This principle will be found to be of fruitful application in every branch of law, in servitudes, obligations, institutions. So far as the present case discloses, the right set up is based upon a purely capricious exercise of the plaintiff's will, in the effectuation of which he has no conceivable interest. I do not stop here to show how this principale lies at the root of many propositions of English law. It is, undoubtedly, the general principle of jurisprudence to which, with some vagueness, the Privy Council adverted in *Renaud* v. *Guillet* (L. R. 2 P. C. 4), a case quoted by the Advocate General. "You shall not sell" is void. "If you sell you shall give

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me the first offer" may be perfectly valid. "You shall not alienate" is void. "You shall not alienate so as to destroy the rights of your son" is perfectly valid, of course provided that the form necessary to effectuate the limitation is observed. The distinction on the principle stated is perfectly intelligible. On the ground, therefore, that contractual words seeking to create a right of this sort are ineffective to create it, I am of opinion that the alienations by mortgage have been wrongly declared void. Then, it was sought to show that the declaration in the former suit of the incapacity to alienate prevented us from coming to this conclusion. Now, the decree in that suit was a dismissal of the plaintiff's claim to get possession of these very lands, and, in the judgment, in the course of showing that there was no such right, the Judge chose to say that the agreement was such as to entitle the plaintiff to the produce and to prevent the plaintiff from alienating. Assuming for the moment that any part of a judgment, by which a plaintiff's suit is dismissed, could make any statement against a defendant *res-judicata*, a matter by no means clear, it is quite plain that this was not a decision on a matter of fact which it was necessary to determine to reach the conclusion, and, even upon the most liberal views as to the scope of *res-judicata*, this is necessary. It is manifest that this was not and could not be any decision upon the point. I am of opinion that the decree of the Civil Judge ought to be reversed with costs.

There has been no appeal as to this perpetual injunction, and I wish to guard myself against being supposed to think that this remedy was properly sought or properly given in this suit.

Appeal allowed.

Original Jurisdiction. (a)

In Chambers.

Original Suit No. 312 *of* 1871.

DESOUZA *against* RANGAIAN.

Under the Summary Procedure in Bills of Exchange Act (V of 1866) the plaintiff is entitled to claim by his summons and obtain by his decree whatever sum, principal and interest, is, on the legal construction of the instrument, demandable.

1871. *June* 8. *O. S. No.* 312 *of* 1871.

IN the matter of this suit *Champion (Messrs. Grant and Champion)* moved this day for an order directing the Registrar to enter in the summons to be issued in the said suit against the defendant a claim for interest at the rate of 12 per cent. per annum; the Registrar having refused to insert such claim, because the note sued on did not bear interest on the face of it.

HOLLOWAY, J.—I entertain no doubt, and I believe that every Judge of the Court concurs with me, that, under the Summary Procedure in Bills of Exchange Act, the party is entitled to claim by his summons and obtain by his decree whatever sum, principal and interest, is, on the legal construction of the instrument, demandable. If, in a regular suit, interest would, on the construction of the instrument, be given, then it is claimable and obtainable in this summary process. As to interest beyond the scope of the instrument the question is a different one, and, as I think, out of the scope of the Act.

(a) Present :—Holloway, J.

Appellate Jurisdiction. (a)

Special Appeal No. 463 *of* 1870.

KOTTAL UPPI..............................*Special Appellant.*
EDAVALATH THATHAN NAMBU'DIRI...*Special Respondent.*

Third defendant, purchaser of the interest of 1st and 2nd defendants, held certain lands under the terms of a permanent kánam (A) which contained the following condition—" And (I have also agreed) that on failure to pay the said quantity of paddy the kánam amount of 550 fanams shall be received by me, and the land restored." In a suit by the kánamdár to recover possession for non-payment of rent : *Held*, that this condition of redemption was intended as a penalty to secure regular payment of the rent, and that, such being the original intention of the parties, the penalty was one which ought to be relieved against.

1871. *June* 7. *S. A. No.* 468 *of* 1870.

THIS was a Special Appeal against the decision of K. R. Krishna Menon, the Principal Sadr Amín of Tellicherry, in Regular Appeal No. 50 of 1869, modifying the Decree of the Court of the District Munsif of Chavachéri in Original Suit No. 18 of 1867.

The suit was brought to recover one parcel of land and one paramba, alleged to have been demised on a permanent kánam of 550 fanams, by plaintiff's father to 2nd defendant, on 7th Makarom 1031 (19th January 1856).

Plaintiff alleged that the tenant's right to enjoy the lands for ever was dependant upon his regularly paying the rent, and that he having failed to do so, the cause of action arose.

1st and 2nd defendants stated that the counterpart (A) sued upon was a forgery ; that the land and paramba were first demised in a perpetual lease by plaintiff's father to 2nd defendant, subject to an annual rent of 25 dangalies of paddy ; that on receipt of a further sum of 150 fanams, plaintiff's said father passed a kudima jenm right to 1st defendant, reducing the rent to one fanam, and that this right had been mortgaged to 3rd defendant by the 1st and 2nd defendants.

The 3rd defendant admitted the truth of the statements of 1st and 2nd defendants, and further stated that he instituted a suit and obtained a decree for the repayment of the mortgage amount, and that when the property was sold in

(a) Present :—Innes and Kindersley, J. J.

execution of the said decree, he purchased it, and that it was not liable to be returned to plaintiff. 1871. June 7. S. A. No 468 of 1870.

The following is a translation of Exhibit A :—

"As the land known by the name of "Kángiléri Kovíl," which is your jenm property, was formerly assigned on kánam of 550 fanams to one Ayyalúr Ahonod, and as you have executed a karár to me authorizing me to pay the said amount of kánam, to obtain the document, to render the said waste land cultivable, to hold and to cause to hold and enjoy it permanently (for ever) by myself and by my heirs on jenm koyu kánam right; I have agreed to pay you from 1032 (1856-57) for the space of 10 years at the rate of 25 seers of paddy annually out of the produce of the said land, and after the expiry of 10 years, 10 seers of paddy shall be added to it, and at the rate of 35 seers the paddy shall be carried over to the jenmi's Edavalath Illom, and there it shall be measured and given and receipt obtained. And I have also agreed that, on failure to pay the said quantity of paddy, the kánam amount of 550 fanams shall be received by me and the land restored."

The District Munsif disallowed a portion (the paramba B) of the ground included in the plaint, and otherwise decreed as sued for.

Plaintiff appealed against that portion of the Munsif's decree which disallowed the paramba B.

The judgment of the Principal Sadr Amín contained the following :—

"The sole question for consideration is whether the piece of ground marked B in the plan prepared by the Commissioner deputed by the Lower Court to institute a local enquiry, is a portion of the plaint land, or that of another paramba, permanently alienated by the plaintiff's father to 2nd defendant on the same day on which the plaint demise was made by him to the same defendant. The Exhibit I evidences the permanent alienation, while the Exhibit II and its counterpart A evidence the demise upon which this suit is brought. Whether the piece of ground B is included in the document I, or in II, is thus the sole question for

1871. June 7. S. A. No. 468 of 1870.

determination. If it were included in the document I, it is clear that the plaintiff cannot recover it, seeing that the right on which the paramba was alienated is a kudima jenm (perpetual lease.) If it be shown on the other hand that it is a part and parcel of the land demised as per the document II, the plaintiff is entitled to recover it, as the right of perpetual enjoyment under it is to be repealed by the non-payment of rent."

Upon the facts he found that there was "sufficient to prove that the ground B is a portion of the plaint land and not that of the paramba alienated under the document I, and I therefore reverse so much of the Munsif's decree as disallows the piece of ground marked B in the Commissioner's plan and decree as sued for."

The 3rd defendant preferred a special appeal on the ground, amongst others, that the plaintiff was not entitled to evict for mere non-payment of rent.

Sanjiva Rau for the special appellant, the 3rd defendant.

The *Acting Advocate General* for the special respondent, the plaintiff.

The Court delivered the following

JUDGMENT:—The 3rd defendant not having appealed against the decree of the District Munsif, any relief which we may grant to him on this special appeal will extend only to the paramba B, which was decreed to the plaintiff by the Principal Sadr Amín.

It has been found that the paramba B, together with the other land claimed in the plaint, was mortgaged or let to the 2nd defendant by plaintiff's father on a perpetual kanam of 550 fanams, or Rs. 110, subject to the payment of a porapad, or annual rent of 25 seers of paddy, to be increased after ten years to 35 seers. The 2nd defendant has executed counter-deed A, which is found to be a genuine document, and which contains the following condition—"And (I have also agreed) that on failure to pay the said quantity of paddy the kánam amount of 550 fanams shall be received by me, and the land restored."

The defendants having made default in the payment of rent, the plaintiff seeks to enforce this condition, and to re-

cover the land on payment of the kánam amount. The 3rd defendant, who has purchased the interest of the 1st and 2nd defendants, contends that the Court should relieve him against this forfeiture. And the point reserved for consideration was whether we ought to grant such relief.

Where the parties have not come to any express agreement on the point, an ordinary kánam tenure for twelve years is not forfeited by non-payment of rent (1 M. H. C. Reps. 112), and the same rule of non-forfeiture would, we conceive, hold good in the case of a perpetual kánam. But here we have a perpetual kánam with an express condition for the redemption of the land in case of non-payment of rent. And in determining whether such condition should be enforced, we think that we should consider whether it was intended by the parties to be a penalty for the purpose of securing the payment of rent. It has been laid down in *Peachy* v. *The Duke of Somerset*, 1 Strange, 447, which will be found also in Tudor's Collection of Leading Cases in Equity, that the true ground of relief against penalties is from the original intent of the case where the penalty is designed only to secure money, and the Court gives all that was expected or desired.

What, then, was the intention of the parties in this case? It was certainly their intention to create a perpetual tenure. The land appears to have been to some extent waste; and it was agreed that the 2nd defendant was to render the said waste land cultivable, to hold and to cause to hold and enjoy it permanently (for ever) for himself and his heirs. This being the principal intention of the parties, it could hardly have been anticipated that the 2nd defendant, having laid out capital and labour on the property, would be content to forfeit his improvements on account of the trifling rent payable on the land. The intention, clearly, was that the rent should be regularly paid, and the condition of redemption was intended as a penalty to secure such regular payment. To enforce such a penalty would in many cases be productive of hardship. We are, therefore, of opinion that as regards the paramba B we ought to decree only arrears of rent with interest at 12 per cent. We think, also, that the plaintiff should bear the costs of this special appeal.

Appellate Jurisdiction. (a)

Special Appeal No. 37 *of* 1871.

AMBALAVANA PADEIYA'TCHI...............*Special Appellant.*
SUBRAMA'NIA PADEIYA'TCHI and another.*Special Respondents.*

The 1st hearing of a suit was fixed for the 10th July 1867. Neither of the parties nor their Vakíls appeared. Thereupon the Court dismissed the suit under Sec. 148 of the Civil Procedure Code, but afterwards, upon the application of the plaintiff's Vakíl, restored it to the file for hearing, under Sec. 119. Plaintiff obtained further adjournments to produce witnesses, the last being an adjournment to the 28th September. On that day the Vakíls of both parties appeared, but no witnesses, and the Court again dismissed the suit under Sec. 148, for failure to produce witnesses. On the 22nd of October the suit was again, under Sec. 119, restored to the file on the application of the plaintiff's Vakíl, and a decision was afterwards come to, for the plaintiff, upon the merits. On appeal the last mentioned decree was reversed and the decree passed under Sec. 148 (whether the first or second decree was not specified) upheld, upon the ground that as Sec. 119 was inapplicable to a decree passed under Sec. 148, the Court of First Instance had acted without jurisdiction in restoring the suit to the file. *Held*, on special appeal, reversing the decision of the Lower Appellate Court, that the first decree of dismissal, being a decree which might have been made under Sec. 147, was one to which Sec. 119 might be applied. That the second decree of dismissal was one to which Sec. 148 alone applied, consequently one subject only to review or to an appeal, and the proceeding had in October 1867, being substantially an application for review, was one which the Court had power to grant.

1871. *June* 14. *S. A. No.* 37 *of* 1871.

THIS was a Special Appeal against the decision of H. W. Bliss, the Acting Judge of the Court of Small Causes at Cuddalore, on the Principal Sadr Amin's side, in Regular Appeal No. 16 of 1868, reversing the decree of the Court of the District Munsif of Chellambiram in Original Suit No. 374 of 1864.

R. Báláji Rau for the special appellant, the plaintiff.

Johnstone for the special respondents, the 9th and 10th defendants.

The following judgment, in which the facts fully appear, was delivered by

SCOTLAND, C. J.—This is a singular case of error in Procedure. The Court of First Instance, after twice dismissing the suit expressly for default, under Section 148 of the Code of Civil Procedure, and restoring it to the file for hearing, under Section 119, which has no application to Section 148 (See *Comalammal* v. *Rungasawmy Iyengar*, 4 M. H. C. Rep. 56), heard the case fully and pronounced

(a) Present:—Scotland, C. J. and Kindersley, J.

a decree in favor of the plaintiff. But the Lower Appellate Court has reversed that decree, and upheld the decree passed under Section 148 (whether the first or second decree is not specified), upon the ground that, as Section 119 was inapplicable to a decree of dismissal under Section 148, and as, therefore, the Court of First Instance acted beyond its jurisdiction in subsequently hearing and deciding the suit, the decree under Section 148 was the final decree remaining in force.

Whether this decision is sustainable is the question for determination in the present special appeal. The material facts are these:—The first hearing of the suit was fixed, after two or three adjournments (not, it appears, granted on the application of the parties), for the 10th July 1867, and neither of the parties nor their Vakils appeared. The Court thereupon decreed the dismissal of the suit under Section 148, but soon afterwards, upon the application of the plaintiff's Vakil, ordered its restoration to the file for hearing, under Section 119. Several adjournments of the hearing took place, afterwards, at the instance of the plaintiff, and expressly, the record shows, for the purpose of giving him time to produce witnesses, the last being an adjournment to the 28th September. On that day the Vakils of both the plaintiff and defendants appeared, but no witnesses were produced, and the Court, refusing to entertain an application for further time, again decreed the dismissal of the suit, under Section 148, for the failure to produce witnesses after time allowed for that purpose. On the 19th October the plaintiff's Vakil presented a petition, under Sec. 119, and on the 22nd October the Court made another order under that Section for the restoration of the suit to the file: and thereupon the hearing took place which resulted in the decree for the plaintiff upon the merits.

There is no doubt that if the Court is precluded from looking beyond the provisions in Sections 119 and 148, under which the Court of First Instance acted, the decree of the Lower Appellate Court must be affirmed. But that is clearly not so. If jurisdiction to hear and determine the suit, after the decrees of dismissal, can be sustained under any other

1871. June 14. S. A. No. 87 of 1871.

provision of the law of Procedure, we are bound to give effect to such provision, and I am of opinion that it can.

With respect to the first decree of dismissal, it appears to have been passed on a day fixed by adjournment for the first hearing of the suit, and really for the default of non-appearance of the parties or their Vakils. It was a decree, therefore, that might have been made under Section 147 (for this *Comalammal* v. *Rungasawmy Iyengar* and the subsequent case of *Rangasamy Mudelliar* v. *Sirangan*, 4 M. H. C. Reps. 254, are authorities), and was consequently one to which Section 119 might be applied.

But the same cannot be said as to the second decree of dismissal. The Vakils on both sides were present, and Section 148 alone applied to the default for which the decree was passed. It was clearly, therefore, a final decree, subject only to a review of judgment or an appeal; and it is upon the provisions giving jurisdiction to review a judgment that I think the proceedings of the Court of First Instance after the second decree can be sustained. There was a petition of the plaintiff, praying the reversal of it, presented within the time allowed for a review, and bearing the proper stamp for a review petition, and the opposite party had due notice. Upon that petition the Court considered that the case made by the plaintiff showed that its decision was incorrect and ordered the reposting of the suit for another hearing. This proceeding was, substantially, in accordance with that required on an application for a review of judgment which the Court had the power to grant. For these reasons, I am of opinion that the jurisdiction of the Court of First Instance, to set aside its decrees of dismissal and fully hear and determine the suit, is sustainable, and, consequently, that the decree of the Lower Appellate Court should be reversed and the case remanded for the hearing and determination of the other questions raised in the Regular Appeal. I think the appellant should have costs in the Special Appeal, and that the costs hitherto, in the Courts below, should abide the determination in the Regular Appeal.

KINDERSLEY, J.—I concur in the judgment of the Chief Justice.

Suit remanded.

Appellate Jurisdiction. (a)

Special Appeal No. 133 *of* 1871.

BUCKAPATNAM THATHACHARLU......*Special Appellant.*

KAJAMIYA and another................*Special Respondents.*

Suit by a vakil for fees. The defendants retained the plaintiff as their Pleader in Original Suit No. 2 of 1863, on the file of the Civil Court of Cuddapah, and executed a vakálatnáma to him in July 1863, but no special agreement regarding fees was made. The plaintiff conducted that suit for the defendants as their Vakíl until decree, which was made in September 1864. The present suit was instituted in December 1866. *Held*, reversing the decree of the Lower Appellate Court, that as there was no special agreement, the plaintiff's right of suit did not arise until he had completely discharged his duty in the conduct of the suit, which he had done in 1864. Consequently, the present suit, having been brought within three years from that date, was not barred.

1871. *July* 8. *S. A. No.* 133 *of* 1871.

THIS was a Special Appeal against the decision of A. C. Burnell, the Acting Civil Judge of Cuddapah, in Regular Appeal No. 18 of 1870, confirming the Decree of the Court of the Principal Sadr Amín of Cuddapah in Original Suit No. 136 of 1868.

The suit was brought for Rupees 800, as pleader's fees, including interest thereon for 39½ months.

The plaintiff stated that the defendants retained him as their pleader in Original Suit No. 2 of 1863 on the file of the Civil Court of Cuddapah, under an agreement to pay him 600 Rupees as fees; and that he pleaded on their behalf until the suit was disposed of; that he made frequent demands on the defendants for the sum due, the last demand being on the 2nd November 1866, but they refused to pay him. Hence the suit.

The 1st defendant pleaded that the suit was barred by the Statute of Limitation.

The 2nd defendant did not appear.

The Principal Sadr Amín dismissed the suit.

The Plaintiff appealed to the Civil Court.

The Civil Judge confirmed the decree of the Court of First Instance upon the ground that the suit was barred by the Law of Limitations, considering that the Act commenced to run from the date of the execution of the vakálatnáma

(a) Present:—Scotland, C. J. and Kindersley, J.

1871. July 3. S. A. No. 133 of 1871.

to plaintiff, July 1863'; the plaint in the present suit not having been filed until December 1866.

The plaintiff preferred a special appeal to the High Court upon the ground that the suit was not barred by the Act of Limitations.

Párthasáradhi A'yyangár for the special appellant, the plaintiff.

Gúrumúrti A'yyar for the 1st special respondent, the 1st defendant.

The Court delivered the following

JUDGMENT:—We are of opinion that the decree in this case is not maintainable. The question as to the bar is, when did the period of limitation commence to run, or, in other words, when did the plaintiff's right to bring a suit first arise? Now, although a Vakíl may not be obliged to undertake the conduct of a suit unless paid a fee, we think it is clear that having once undertaken its conduct, he is bound to proceed with it, and cannot sue for his fee until he has completed the work which is the consideration for the fee, except where his client has dispensed with his services, and the Court has, under the power given for that purpose, granted him a portion of the proper fee. In the present case, therefore, as there was no special agreement, the plaintiff's right of suit did not arise until he had completely discharged his duty in the conduct of the suit, and that he appears to have done in 1864. The present suit being brought within 3 years from that date was not barred. We, therefore, must reverse the decree of the Lower Appellate Court and remand the suit to the Lower Appellate Court for the hearing and determination of the questions raised by the appeal to that Court. The appellant's costs in special appeal must be paid by the respondents. The costs hitherto, in both the Lower Courts, will abide the determination in the regular appeal.

Suit remanded.

Appellate Jurisdiction. (a)

Special Appeal No. 121 *of* 1871.

NARRAINA TANTRI and another......*Special Appellants.*

UKKOMA and another..................*Special Respondents.*

The 1st plaintiff claimed to redeem a mortgage to defendants' ancestor for Rupees 320. Defendants pleaded that the mortgage was for Rupees 2,336-4-0, and redeemable only at the pleasure of the mortgagee. They also pleaded the Limitation Act. The Original Court decreed redemption on payment of the amount stated by defendants. The Lower Appellate Court reversed that decree and dismissed the suit as barred.

Held, reversing the decree of the Lower Appellate Court, that an acknowledgment by the mortgagees of the mortgagor's title, sufficient to take the case out of the Statute, was evidenced by their written answer in Suit No. 238 of 1830, and by the answer in Original Suit No. 441 of 1861, as recited in the judgment in that suit, although the right to redeem and the amount of the mortgage were denied, and the acknowledgments were not made before those suits were brought.

The Act for the limitation of suits does not require that the acknowledgment of the title of a mortgagor should be made to any particular person, or at any particular time before the institution of the suit in which the bar is pleaded.

1871. *July* 5. *S. A. No.* 121 *of* 1871.

THIS was a Special Appeal against the decision of M. J. Walhouse, the Civil Judge of Mangalore, in Regular Appeals Nos. 180 and 142 of 1870, reversing the decree of the Court of the District Munsif of Bekal in Original Suit No. 222 of 1867.

The suit was brought to redeem a piece of land, said to have been mortgaged by second plaintiff's ancestor to defendants' ancestor, on payment by 1st plaintiff of the mortgage amount, Rupees 320, to the defendants; the second plaintiff, the owner, having sold the land to the first.

The defendants contended that the mortgage was for Rupees 2,336-4-0 and redeemable at the mortgagee's pleasure only. They also pleaded that the suit was barred by the Law of Limitation.

The Munsif declared the plaintiffs entitled to redeem on payment of the mortgage amount stated by the defendants and the value of improvements; as he considered that the claim had been taken out of the operation of the Act of Limitations by reason of certain admissions made by the defendants. 1st, It appeared from Exhibit A. the judgment in Appeal Suit No. 422 of 1865, that in that suit, in which

(a) Present:—Scotland, C. J. and Kindersley, J.

1871. July 5. S. A. No. 121 of 1871.

the present 2nd plaintiff was plaintiff, the present defendants put in their statement admitting their enjoyment of the estate under a mortgage made to their ancestor by the plaintiffs' ancestor for Rupees 2,336-4-0.

2nd, Exhibit D, a written statement presented by the ancestors of the present defendants in Suit No. 238 of 1830, contained the following :—" In 1801, Késava (plaintiffs father) executed a usufructuary document for pons 584, for a certain quantity of land [*here followed particulars of lands*] to my maternal uncle Ambu, and directed us, &c..........and according to that document a large sum has been expended on improvements and my maternal uncle and ourselves have enjoyed it for the last 31 years, paying assessment. While so, 1st plaintiff having learnt that we have improved the land, having colluded with the 1st defendant, brought this suit."

The defendants appealed to the Civil Court.

The Civil Judge, in his judgment, said—

"The mortgage sought to be redeemed by plaintiffs was admittedly made more than 60 years previous to the institution of the present suit, and the only question for determination is whether anything has removed the bar of Limitation that at once arises.

Exhibit D, which is an answer made by defendants' ancestors thirty-seven years ago, in which they stated that the plaint land had been mortgaged to their uncle, has been relied upon as an acknowledgment of the kind referred to in Clause 15, Section 1 of the Limitation Act, as sufficient to give a fresh period of Limitation, and has been so held by the Lower Court.

Though Exhibit D referred to the mortgage, it denied the plaintiffs' right to redeem, and, what is of most consequence, was not an acknowledgment made before suit, and as such does not appear to me to be of the nature contemplated in the Section referred to, inoperative, therefore, to give a fresh period of Limitation..

Regarding plaintiffs' claim as barred, I reverse the Munsif's decision, with costs."

1871. July 5. S. A. No. 121 of 1871.

The plaintiffs preferred a special appeal on the ground that the suit was not barred.

Párthasáradhi A'yyangár for the special appellants, the plaintiffs.

Rámachandráyyar for the special respondents, the defendants.

The Court delivered the following

JUDGMENT:—The claim of the 1st plaintiff in this case, to redeem a mortgage to the defendants' ancestor for Rupees 320, has been met by the plea that the mortgage to the defendants' ancestor was not for Rupees 320, but for Rupees 2,336-4-0 and redeemable only at the pleasure of the mortgagees. The defendants also pleaded that the suit was barred by the Law of Limitation. The Original Court decreed redemption of the land on payment of the mortgage amount stated by the defendants. The Lower Appellate Court reversed that decree and dismissed the suit on the ground that it was barred by the Act for the limitation of suits.

There is no doubt that the period of limitation applicable to the claim had elapsed before the institution of the suit. The question for determination is whether there was in the meantime a written acknowledgment of the mortgagors' title signed by the mortgagees. We are of opinion that such an acknowledgment by the mortgagees is evidenced by their written answer in Suit 238 of 1830, and that of the present defendants in their answer in O. S. 441 of 1861, as recited in Exhibit A. The Civil Judge seems to have considered the acknowledgment unavailing, because the right to redeem, as alleged in the plaints, was denied in both suits, and because the acknowledgment was not made before those suits were brought. It does appear that the right to redeem was denied, but the relation of mortgagor and mortgagee was admitted, and the denial of the right to redeem and of the amount of the mortgage debt as alleged by the plaintiff was rested upon the terms of the mortgage contract. The acknowledgment, therefore, of the title of the mortgagor was distinct, and what Clause 15, Section 1 of Act XIV of 1859 requires is "an acknowledgment of the title of the depositor,

1871. July 5. S. A. No. 121 of 1871.

pawner or mortgagee, or of his right of redemption." Whether the right to redeem had arisen or not under the terms of the contract was a different question, and one which still remains to be finally decided. The other ground of the Civil Court's decision we think erroneous.

The Act for the limitation of suits does not require that the acknowledgment of the title of a mortgagor should be made to any particular person, or at any particular time before the institution of the suit in which the bar is pleaded. The enactment in Clause 15, Section 1, is quite general. It is therefore, we think, no valid objection that the acknowledgments were made in other suits. See the Case of *Nijamudin* v. *Mahammadali*, 4 M. H. C. Rep. 385.

For these reasons we reverse the decree of the Lower Appellate Court, and remand the suit for the determination of the other questions raised by the regular appeal. The costs of this special appeal must be paid by the respondent, and the costs hitherto in both the Lower Courts will abide the determination of the regular appeal.

Suit remanded.

Original Appellate Jurisdiction. (a)

Regular Appeal No. 8 *of* 1870.

N. VISALATCHMI AMMA'L..................... *Appellant.*

N. SUBBU PILLAI and others................ *Respondents.*

The Hindu law makes no distinction in favor of gifts in contemplation of death, as respects the legal requisites to constitute a perfect disposition by gift. Those requisites are,—A giving, either orally or by writing, with the intention to pass the property in the thing given, accompanied by its actual delivery and acceptance in the donor's life-time.

When all these requisites have been fulfilled, there is nothing in Hindu law to prevent effect being given to a gift in contemplation of death.

The theory of the *donatio mortis causâ* considered.

1871. April 13. May 18. R. A. No. 8 of 1870.

THIS was an appeal from the decree of Kernan, J. in Original Suit No. 317 of 1870.

The plaintiff sought to be declared to be lawfully entitled to and the rightful owner of certain Government Promissory notes together with the interest due thereon, and prayed that the defendants, as the executors of N. Ponnambalam Pillai deceased, might be directed to endorse and make over the said Promissory notes to her.

(a) Present Scotland, C. J. and Holloway, J.

1871. *April* 18. R. A. No. 8 of 1870.

The subject of the plaintiff's claim was.—That N. Ponnambalam Pillai, merchant, died at Madras on the 28th February 1869, leaving a will, dated the 26th October 1868, in which he appointed the defendants his executors, and also a Codicil, dated the 25th February 1869: of which Probate was granted to the defendants, the executors, on the 22nd May 1869. That the said N. Ponnambalam Pillai left him surviving two widows, Chellammal and the plaintiff, an infant daughter and an adopted son, the natural son of a brother of the said Chellammal. That on the 23rd February 1869, the said N. Ponnambalam Pillai gave and delivered to the plaintiff the said Government Promissory Notes in presence of the 2nd and 3rd defendants, as and for a provision and maintenance for her, the said plaintiff, after his death. That the defendants (except the 2nd defendant) refused to endorse to plaintiff the said Promissory Notes. In consequence of this refusal the suit was brought.

The issue settled was :—Whether the Government Promissory Notes in the plaint mentioned were the objects of a valid gift by the said Negapatam Ponnambalam Pillai to the plaintiff as is by the plaintiff alleged.

The case came on for final disposal before Kernan, J., on the 29th of July 1870, when the suit was dismissed.

The plaintiff appealed.

O'Sullivan and *Johnstone,* for the appellant.

The *Acting Advocate General* and *Miller,* for the respondents.

This day the Court delivered the following judgments :— *May* 18.

SCOTLAND, C. J.—The question for determination in this appeal is whether an effectual gift of the Government Promissory Notes described in the plaint to the plaintiff by her deceased husband was established by the evidence at the trial, and it involves two points :—(1) Whether a gift of the notes, as alleged in the plaint, was in fact proved. (2) Whether, if so, it was valid in law. The learned Judge, who tried the case, being of opinion that the evidence failed to prove the alleged gift, he dismissed the suit.

1871. May 18. R. A. No. 8 of 1870.

At the close of the argument I intimated that this conclusion was not, in the judgment of the Court, sustainable, but that the second point required a little further consideration. I am now of the same opinion as to the effect of the evidence. The evidence of the plaintiff in support of the allegations in the plaint is directly and strongly confirmed by several witnesses of unimpeached character, who, with one exception, were not likely to be more favorably disposed towards the plaintiff than towards the defendants: and—what is still more forcible—their evidence, in its important particulars is, to my mind, very satisfactorily borne out by the testimony of the 1st and 3rd defendants. The particulars I allude to are.—That the deceased sent for the notes in dispute after the date of his will, and two or three days before he executed the Codicil; and, when brought, he directed the 3rd defendant in the presence of his adopted son (the 1st defendant), the plaintiff, and one or two other persons, to deliver them to the plaintiff, which the 3rd defendant did immediately, and they have remained in her possession ever since. That the next day and several times subsequently the plaintiff asked the deceased to endorse the notes, but each time he made an excuse. That on the day of the execution of the Codicil, the 3rd defendant, by desire of the deceased, sealed up in a safe almirah all bonds, deeds and other valuable property except the notes in dispute and a watch and chain which had been in the plaintiff's keeping. That on the death of the deceased, on the 28th February 1869, the 3rd defendant, as one of the executors named in the will, took possession of the other bonds and deeds which had been sealed up, and asked for and obtained from the plaintiff the watch and chain; but did not ask for the notes in dispute, nor seek to obtain possession of them, until a few days before this suit was brought on the 8th June 1870. The loose statements of the 3rd witness, as to demands having been made in the interval, I consider unreliable.

The direct support afforded on these points by the evidence for the defendants appears to me to make the case of the plaintiff, so far as it rests upon the oral evidence, one of

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the strongest—but it has been argued that improbabilities, weighty enough to discredit it, arise out of the circumstances that in the Will an equal provision is made for the plaintiff and the other widows of the deceased, and Rupees 20,000 of the Government notes are bequeathed for religious and educational purposes and the remainder given to the deceased's adopted son (the 1st defendant); and that in the Codicil no allusion is made to the gift to the plaintiff. With respect to the Will, I think the improbability, if any, very slight when it is considered that the deceased was aware that the other widow would, as guardian of her relation the adopted son of the deceased, have the management of his share of the property to the exclusion of the plaintiff; and that the amount of the notes given to the plaintiff reduces only the bequest for charitable purposes. As to the Codicil, I think it does give rise to some degree of improbability against the gift, but the omission may have been owing to the open and deliberate manner in which the notes had been delivered to the plaintiff; and in opposition to the very strong proof of the plaintiff's case afforded by the oral evidence on both sides, it can, in my opinion, be given no effect.

Upon the whole, I think it proved that the deceased, contemplating that his illness would end in death in a short time, delivered the notes to the plaintiff with the intention that they should be her property from the time of delivery, if his illness ended in death.

Had English law been the law governing the deceased, I should probably have felt bound to conclude that he did not intend the property in the notes to pass until his death, upon the ground that he had presumably the intention to make a good *donatio mortis causâ* according to that law; and there is no doubt that, according to the English decisions, such gift might be held to be established by the evidence. See the cases in the note to *Ward* v. *Turner*, 1 White and Tudor's *Leading Cases*, and *In re Veal*, 29 L. J. Ch. 321.

But the Hindu law alone is applicable to this case, and although that law appears to approve of some gifts in con-

1871. May 18. R. A. No. 8 of 1870.

templation of death, (See 1 Strange, H. L. 169; 2 Ib. 426) it makes, I think, no distinction in favor of such gifts as respects the legal requisites to constitute a perfect disposition by gift. And there can, I apprehend, be no doubt that those requisites are—A giving either orally or by writing with the intention to pass the property in the thing given, accompanied by its actual delivery and acceptance in the donor's life-time. To this law it is that the deceased's acts in making the disposition must be referred, and so regarding them, I think it fully proved that the notes were delivered with the intention of making them the property of the plaintiff from the time of their delivery, subject to a conditional right of resumption. That the deceased intended to part with the dominion over them and vest it in the plaintiff beneficially, but limitedly until the contemplated event happened.

The circumstance that he did not make the usual endorsements does not appear to me to affect the validity of the gift. Endorsement of a Government Promissory Note is the evidence of the holder's title to the principal and interest thereby secured which is required and acted on by the Officers of the Government Treasury, and they would not have made payments on these unendorsed notes in the deceased's life-time. But I entertain no doubt that the property in such a note, and the right to the money secured by it, passes by a form of transfer which is operative under the general Hindu law, although unaccompanied by an endorsement, and that a complete verbal gift is as effectual for such purpose as an assignment in writing for a valuable consideration, or a bequest in a will. In but one respect, I think, is the circumstance of the absence of endorsements of importance in the present case, and that is its bearing on the question of the deceased's intention in parting with the notes, and weighed with the other circumstances proved, its only effect, I consider, is to support the conclusion I have come to, that the condition of the death did not suspend the change of property in the notes, but limited contingently the right which passed. In effect, the gift was made subject to a power of revocation dependent upon the donor's death

not happening as contemplated, and I am not aware that there is anything in the Hindu law rendering a complete gift, which is conditionally determinable upon such an event, less effectual to pass property than one which is absolute in its terms. Such a *donatio mortis causâ* I am of opinion the Hindu law does permit.

Then, if I am right in this view of the validity of the gift, the plaintiff is certainly entitled to call upon the defendants, who are the representatives of the deceased, to make the usual endorsements on the notes, should such endorsement be required at the Government Treasury. The property in the principal and interest secured by the notes having been effectually transferred from the deceased to the plaintiff, these defendants have the duty cast upon them, by law, of doing what is necessary to enable the plaintiff to receive the property which has become her's by the gift. [See *Ellison* v. *Ellison*, and the cases in the note, 1 White and Tudor.]

For these reasons I am of opinion that the decree of the Division Court must be reversed, and that the plaintiff must be declared to be entitled absolutely to the Government Notes sued for, and the principal and interest thereby secured, and to receive the arrears of interest due thereon. And the defendants, who are the representatives of the deceased donor, must be ordered to endorse each of the said notes in the usual manner, should their endorsements be required at the Government Treasury. I think the plaintiff's costs in the Division Court should be paid by the defendants, and that the parties should bear their own costs in this appeal.

Holloway, J.—Coming to the conclusion from the positive evidence, the separation of the object from the other property, the conduct of the executors cognizant of the facts in not taking possession, and the long period allowed to elapse between the death and the attempt to get possession, that all the requisites of such a gift were fulfilled in point of fact, the question which remains is whether there is anything in Hindu law to prevent effect being given to it.

1871. May 18. R. A. No. 8 of 1870.

To determine this it is necessary to see what is the theory of this gift in Roman law and in the English law derived from it. I take the statement of the law from the most illustrious of all teachers of the Pandects and his little less illustrious successor.

It is a gift made upon the pre-supposition or condition that the donee survives the donor. Like the testamentary disposition, its aim is the giving up of something at the time at which the donor can no longer have it himself. Hence, however, in other respects, the content of the gift is marked out, what is given *is first definitively acquired* at the death of the donor. Cum magis se quis velit habere, quam eum qui donat magis que eum cui donat quam heredem suum. Windscheid, § 369.

It is like a gift *inter vivos* in pre-supposing an immediate increase of the potentiality of the donee by the donor, and hence sharply distinguishes itself from the legacy. But added to this distinctive mark is another which, not less sharply distinguishes it from the ordinary donation and approximates it to the legacy—That of being actually perfected by the death of the giver. Vangerow, § 561. anm.

At delivery the condition may be that the property in it shall only pass at the moment of the giver's death, but such a suspensive effect is not to be presumed, but it is the rule that an immediate increase of the potentiality of the donee exists which is merely dissolved in certain circumstances (Ib. 560). See also Windscheid II, 356.

The presumption is that the condition is resolutive, not suspensive. Lord Cottenham, in *Edwards* v. *Jones* (a), used language perhaps inconsistent with this (p. 235). That point was, however, not necessary to his decision, and the whole doctrine of the case is inconsistent with the modern authorities. Whether the condition is resolutive, or suspensive, there is no doubt that it retro-acts by English law to the moment of the gift. *Rigden* v. *Vallier*, 2 Ves. Sen. 258; *S. C.* 3 Atk. is quoted by Mr. Justice Williams for the position. It is derivable from the fact that Lord Hardwicke held the words "after my decease" following upon "give,

(a) 1 My. and Cr. 226.

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grant and confirm" to make the act testamentary. It is not, however, a direct authority upon the point. That this was also the opinion of Lord Kenyon, his language, quoted II. W. & T. 839, from a book of but indifferent authority, it is true, distinctly shows. *Jones* v. *Selby* (Wils. Exrs. 735) shows quite clearly the period from which it takes effect.

An obligation as well as a thing may be the object of such a gift (Vang. II. 560). *Lawson* v. *Lawson* (a); *Watt* v. *Ames*, 1 B. & S. 109; *Rankin* v. *Weguelin*. *Veal* v. *Veal* (27 Beav. 309 & 303).

Now the Hindu law is, in some respects, less rigid in its requirements as to delivery than the laws of either Rome or England. A gift for certain purposes, made even verbally, the heir is bound to satisfy. Colebrooke (*Obl.* 243) lays down that, by Hindu law, a gift or gratuitous contract made by a person afflicted with an incurable distemper is void. When, however, we look at the passage on which he founds this, the incapacity is shown to attach to a gift made by a mind agitated with fever, anger, or lust, or the pain of an incurable disease. It points to defects in the expression of will. Even, however, if it were otherwise, it would be impossible after validating testamentary dispositions constantly made in mortal sickness, as indeed that under which the defendant's claim was, to uphold the position. I quite agree that an exceptional rule ought not to be pushed to all its logical consequences, but it seems to me impossible not to adopt as a rule a proposition which was one of the steps to the establishment of the exception. Wills were established upon the analogy to gifts, and, as Sir T. Strange points out, there is a very striking resemblance between some authorized Hindu gifts and legacies. A gift to take effect after death is a step which pre-supposes in point of logic the validity of a gift to take complete effect at any period between the point of time of delivery and death itself. It is not only a slighter departure from principle than the effectuation of a legacy—for this would, perhaps, not be enough—It is an assumption necessary to the validity of a proposition already established.

(a) 1 P. Wms. 441.

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It is one thing to reason from an exceptional rule as a fresh premiss, with a view to the establishment of further conclusions. Another to assume as a valid proposition a premiss already employed in reaching that conclusion. Important, here, is the just observation of Vangerow that this sort of gift is the middle point between one *inter vivos* and the legacy. Both are valid as to property of which the owner is able to dispose at his will. On the more unfavorable theory that the gift is one with a suspensive condition, the point of time at which the gift takes effect, on the fulfilment of the condition, is that of the original delivery. To allow a gift in the form of a will to be valid, and deny that validity to one much nearer the nature of a gift *inter vivos*, would be logically impossible. To reject the nearer and accept the more remote cannot, certainly, be vindicated. I see no reason, therefore, for doubting that in the state of Hindu law as now administered, the gift here established is perfectly valid. I quite agree that such a gift requires the most satisfactory evidence. In this case it exists in the language of those interested in maintaining it, but equally in the language and conduct of those interested in disputing it. I entertain no doubt that the decree ought to be reversed.

Decree reversed.

Appellate Jurisdiction (a)

Regular Appeal No. 72 *of* 1870.

CHELIKANI TIRUPATI RA'YANINGA'RU.... ... ... } *Appellant.*

RA'JAH SURANENI VENCATA GOPALA NARASIMHA RAU BAHADUR, Zamindár ... } *Respondent.*

According to the Hindu law of succession in force in the Madras Presidency, a sister's son is in the line of heirs.

Semble, he is a Bandhu.

1871. July 6. R. A. No. 72 of 1870.

THIS was a Regular Appeal against the decree of R. B. Swinton, the Civil Judge of Guntoor, in Original Suit No. 10 of 1869.

Plaintiff sued to recover property, real and personal, at the estimated value of Rupees 7,074-8-0, situated in the

(a) Present:—Scotland, C. J. Holloway and Innes, J. J.

village of Zuzuru, including the value of a choultry at Bezwada, of which he claimed to be established as trustee; he claimed to succeed to this property as the next of kin to the husband, named Rájah Kalavakolanu Gopálrau, of a lady named Latchmi Narasamma, into whose possession after the death of her husband (about 30 years ago) the said property came; and which property, after the death of the wife a year prior to the plaint, came improperly into the hands of the 1st defendant, described as Chelikani Tirupati Ráyaningár, then a person receiving support from the Nuzuvid Zamindár. The 3rd and 4th defendants, with their father the 2nd defendant, were sued for the produce of the lands for Fuslies 1277 and 1278.

Plaintiff's mother, by name Chinnayarau, was the sister of Jagannadha Gopálrau, and his grandfather married the sister of the father of Kalavakolanu Jagannadha Gopálrau, or, stated otherwise, plaintiff's father married his own first cousin Chinnayarau, who was the sister of Jagannadha Gopálrau.

The 1st defendant answered that the plaintiff was not the heir, according to Hindu law, of the deceased Kalavakolanu Jagannadha Gopálrau, nor even a Bandhu; that plaintiff should establish his heirship to the deceased wife of Jagannadha Gopálrau, or to Jagannadha Gopálrau himself. Further, 1st defendant alleged that he had been waiting on his sister, the widow of Jagannadha Gopálrau, for a long time, and had aided her and borrowed money for her and protected her, and that when she became sick in November 1867, she wrote a will in favor of the 1st defendant conveying all her property to him, intending that the estate should be responsible for the debts; that, after her death, the estate was zufted by the Revenue authorities, but afterwards, upon having proof of the will, they put the 1st defendant in possession.

The Civil Judge held, on the authority of *Gridhari Lal Roy* v. *The Government of Bengal,* (a) that the plaintiff was heir to the deceased Rájah Kalavakolanu Gopálrau. The plaintiff appealed.

(a) 1 Ben. L. R. P. C. 44.

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The *Acting Advocate General*, for the appellant, contended that in Madras a sister's son cannot inherit. In support of this position, he referred to and commented upon the following Hindu authorities.

Stokes' Hindu Law Books, p. 345, § 8 (*Dáyabhága*).

Stokes' H. L. p. 443, Sec. 4; p. 445, Sec. 5 and page 448, Sec. 6 (*Mitákshara*). *Smriti Chandrika*, Cap. XI, Sec. 5. The *Mádhavíya* (Burnell's translation) pp. 28, 29. The same rule is laid down in the *Vivâda Chintamani*, p. 297.

Next coming to the more modern authorities.

1 Strange, 146, the passage beginning "Failing male issue of the latter..........."

2 Strange, 243. "It does not appear.........custom of heirs," id. p 245. The same doctrine is recognized by Macnaghten, Vol. I. p. 28; Vol. II. p. 85, note; p. 88, note. Thus Strange and Macnaghten both agree, that although a sister's son does inherit in Bengal, he does not in Madras.

He also cited the cases reported in Sadr Decrees of 1858, p. 175: Sadr Decrees of 1860, p. 246: I. M. H. C. Reps. p. 85: Weekly Reporter, Vol. I. p. 74: id. Vol. 2. p. 180: Wyman's Reports, Vol. I, p. 280: 5 Ben. L. R. Appendix, p. 87: 11. Moo. I. A. p. 386.

J. H. S. Branson for the respondent, contended that the first two cases cited did not apply. That the passage relied upon in I. M. H. C. Reps. is merely a dictum, and that no authority is given in support of the decision at 1 W. R. 74.

He cited the decision of the Privy Council in the case reported at 1 Ben. L. R. P. C. 44, and contended that that was a binding authority on the Court to the effect that a sister's son was within the line of heirs.

The *Acting Advocate General* replied.

July 6. The Court delivered the following judgments.

SCOTLAND, C. J.—The question in this case referred for determination by a full Court is whether the plaintiff is an heir to the property of his mother's brother deceased,

who, it appears, was also related to the plaintiff through his paternal grandmother, being her brother's son. In the argument before us the two points involved in the question were discussed: (1) Whether by the law of succession which governs here, a sister's son is in the line of collateral heirs next after a brother's son,—and if not: (2) Whether he is entitled to inherit as one of the cognate kindred forming the class of Bandhus. If the affirmative of either of these points is right, our determination on the question referred must be in favor of the plaintiff's title to the property in dispute, as the defendants are, it appears, in no way akin to the deceased, and without any right to withhold possession of the property from the legal heir.

Both these points appear to have been decided in the negative by the Privy Council in the case of *Thakoorain Sahiba* v. *Mohun Lall*, 11 Moor. I. A. 386, the second point being given up by counsel and considered by the Court untenable. But the authority of that decision on the second point has, it seems to me, been nullified by the more recent decision in the case of *Gridhari Lal Roy* v. *The Government of Bengal*, 1 Ben. L. R. (not yet reported by Mr. Moore), in which three of their Lordships who decided the former case took part.

There the main question was whether by the Law of Inheritance of the Benares School, which is the governing law here, the appellant, who was the grand uncle *ex parte paternâ* of the last owner of the Zamindári and other property in dispute,—*i. e.* the brother of his father's mother,—was entitled to the property by right of inheritance as against the Government claiming by escheat. The High Court of Bengal had decided that, upon the true construction of the passage in clause 1, section 6, chapter 2 of the Mitákshará, the appellant was absolutely excluded from the class of "Bandhus" capable of inheriting, and consequently had no title to the property sued for. Reversing that decision the Privy Council gave judgment in favour of the appellant, from which it appears that the material grounds of their Lordship's decision were:—That the appellant did not appear to be incapacitated to offer a funeral oblation to his sister's

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grandson. That according to the law propounded in the 2nd chapter of the Mitákshará as to the right of the king to take on failure of heirs, all relations are entitled to inherit to the exclusion of the king. That the description "Bandhus" in the 6th section of the same chapter imports kinsmen springing from a different family and connected by funeral oblations, and, therefore, as the maternal uncle of the deceased's father was such a kinsman, he could be excluded from the right to take as a Bandhu only by an arbitrary definition; and that the enumeration of Bandhus given in the same section did not appear to be such an arbitrary definition. On this point their Lordships say "if for the determination of the question "under consideration, their Lordships were confined to the "four corners of the Mitákshará, they would feel great diffi-"culty in inferring from the omission of 'the maternal uncle' "and 'the father's maternal uncle' from the persons enume-"rated in this text, that either of those relatives is incapable "of taking by inheritance the property of a deceased Hindu "in preference of the king. Such an inference, in the teeth of "the passages which say that the king can take only if there "be no relatives of the deceased, seems to be violent and "unsound. For the text does not purport to be an exhaus-"tive enumeration of all Bandhus who are capable of inherit-"ing, nor is it cited as such, or for that purpose, by the "author of the Mitákshará:—it is used simply as a proof or "illustration of his proposition that there are three kinds "or classes of Bandhus; and all that he states further upon "it is the order in which the three classes take, viz., that the "Bandhus of the deceased himself must be exhausted before "any of his father's Bandhus can take, and so on."

"Again, further doubt is thrown upon the theory of "exhaustive enumeration by the passage of the Mitákshará, "which is not found in that portion of the Treatise which "was translated by Mr. Colebrooke, but has been translated "for the purposes of this suit, and is stated at page 97 of "the Record. The general effect of that passage is to "introduce, in the case of a trader dying abroad, a new class "of remote heirs, viz., his returning co-traders. But this pro-"vision is preceded by an enumeration of preferable heirs, "which includes among Bandhus the maternal uncle. Here,

"then, is a passage, written by the author of the Mitákshará "himself, which treats the maternal uncle as capable of in- "heriting." 1871. July 6. R. A. No. 72 of 1870.

Their Lordships then refer to the Viramitrodáya, and hold a passage in that Commentary declaring that "Bandhus" comprehended maternal uncles and the rest, as an express authority confirmatory of the position that the enumeration in the Mitákshará is not exhaustive, and decisive of the appellant's heirship; and alluding to previously decided cases, their Lordships (without, it would seem, having present to their minds their former decision in the case of *Thakoorain Sahiba* v. *Mohun Lall*) recognize the Full Bench decision of the High Court of Bengal in *Amrita Kúmara Debi* v. *Lakhinaráyan Chuckerbutty*, 2 Bengal L. R. 29, as subversive of the cases cited "in so far as they go to support the "theory that the enumeration of Bandhus in the text quoted "in the Mitákshará is to be taken as exhaustive."

I regard the judgment of the Privy Council in this later case as distinctly determining that the text and commentary in Chapter 2, Section 6, of the Mitákshará, do not restrict the limit of Bandhus to the cognate kindred there mentioned, but merely give instances as illustrations of the degrees of Bandhus in their order of succession: and the grounds and reasons given in the judgment for holding a father's maternal uncle to be one of the cognate kindred who are Bandhus, apply, it appears to me, with certainly not less force to a sister's son. Besides, the right of a sister's son to inherit as a Bandhu is the very point determined by the decision of the High Court of Bengal, which is recognized in the judgment apparently with approval.

I am, consequently, of opinion that this decision of the Privy Council is a conclusive authority in favor of the right of the deceased's sister's son (the plaintiff) to inherit the property as a Bandhu, and that the case should be sent back to the Division Court with this opinion. It has been a surprise to find no allusion made in the judgment to the contrary view of the construction of the Mitákshará laid down in the case of *Thakoorain Sahiba* v. *Mohun Lall*, which was decid-

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ed only about a year before: but I do not feel at liberty to consider the decision as on that account less conclusively binding upon this Court.

It becomes unnecessary to adjudicate on the other point raised in the case, but, if it were necessary, I should think myself precluded by the decision of the Highest Court of Appeal in the last mentioned case from discussing it. In regard to this point, which was fully reasoned, the authority of that decision is not in conflict with the decision in the later case of *Gridhari Lal Roy* v. *The Government of Bengal*. I feel bound, therefore, to consider the former decision a conclusive authority as to the law on the point which it is not open to me to question.

HOLLOWAY, J.—The question is, whether according to the rule of Hindu law, or to any current of authorities opposed to that law, but from which it is impossible to escape, we are bound to reverse the decree of the Civil Judge based upon the proposition of the sister's son being in the line of heirs.

So far as I can find there is no case in this Presidency in which it was necessary to decide the point. At page 246 of the Volume for 1860 there is a case which appears by the *dicta* to raise it, but did not. The question there was whether the son of a daughter could succeed to that daughter's sister—a point which, in opposition to the Pandits, the Court decided against him on the ground that the sister's son did not appear as heir in the list. There is a *dictum* at I, H. C. 85, founded on the supposed cases, Sir T. Strange and the Manuals, and also going on the ground that the sister's son is not specified.

The case in the S. D. A. quoted as authority with Macnaghten's note is again no decision in point, for the law governing was held to be Bengal law. Then there were two cases from the N. W. P., one in favor and one against the position of the sister's son in the line of heirs. The latter followed the Bengal case and Macnaghten's note, and seems to be the principal basis of the decision in P. C. reported at XI Moo. 386. That is the strongest case possible. On

the preliminary point that the appellant had no title at all to sue, the Privy Council reversed the decree below, deciding that he is not a Bandhu as the Court below treated him, and that he is not a Sapinda as Mr. Piffard treated him in the argument, and they suppose the existence of a long course of authority against the construction preventing them from so treating him. The result of that case would, if it stood alone, be that for all purposes of inheritance he is an alien from the family of his maternal uncle. That case seems to have been decided on 4th March 1867, and the case of *Gridhari Lal Roy* v. *The Government of Bengal* came before the same Court on 17th July 1868. Three of the Privy Councillors who sat in the former sat in the latter case. The High Court of Bengal went upon the ground of the non-mention of the brother of the father's mother in the list in the Mitákshará. The Court there decided that the enumeration in the Mitákshará is not exhaustive; that they would have had great difficulty in holding it so even if they were confined to the contents of the Mitákshará as translated, but a new passage appeared from the untranslated portion in which a maternal uncle is distinctly enumerated among the heirs. Without doubt, therefore, they come to the conclusion that the maternal uncle is the father's Bandhu and entitled to succeed to the son in default of Bandhus of his own. Still more strangely, they say that there is no case directly in point, and imply that the matter is still open even in the Courts in India, and still more clearly to themselves.

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Now this is an express decision of the Privy Council in favor of the decree of the Civil Judge, for if the plaintiff is in the line of heirs at all, he must succeed against the defendant, who is admitted to have no title at all. The High Court of Bengal have accordingly decided by a Full Bench, II. Ben. L. R. 28, that the sister's son is in the line of heirs.

It is satisfactory to find it at last recognized that the rule of law is not to be derived merely from the positive words of a commentator and still less from his omissions. It is a still more curious fact that, grammatically, there does not appear to be any such omission. Two of the most eminent commentators, one of them one of the great jurists

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of Southern India, have distinctly told us that, in accordance with an express rule of Panini the infallible, the word 'brothers' means 'brothers and sisters.' That the word in the dual has that meaning there can be no doubt, any dictionary shows it. There does not appear any reason why the plural should have a different signification, and these commentators evidently thought so.

The rule is admitted by the author of the Smriti Chandrika (Cap. XI. s. 5), although he controverts its application because inconsistent with the principle that males alone are competent to inherit. Now, if the transliteration (Putrabheyah) is correct, the author of Smriti Chandrika affirms that the same rule applies to the plural, and I suppose that there is no doubt about it. It is clear that the author of the Mitákshará had no such principle for the modification of the grammatical meaning of his words, for, in Section 7, he makes an unmarried daughter an absolute sharer, and as with him birth is the origin of rights of property, she must be entitled of right. The grammatical construction of his words is, therefore, also the one in accordance with his principles. That the widow's right to a positive share at partition, as well as the daughter's, has been cut down by the distinct contradiction of the texts by subsequent authors, and particularly by Devanda Bhat, there is no doubt, but there seems no doubt whatever that, in the view of the author of the Mitákshará, the sister came in after the brothers in the absence of preferable heirs. The departure from principle has probably arisen from considerations of the inconvenience arising from the probable marriage and estrangement of the daughter, and from the special mention of unmarried daughters when the right to a share is stated. It is to be observed, however, that on the disposal in marriage one-fourth part of a brother's share is to be given (§ 5), and that this means merely enough for marriage expenses is distinctly repelled in (8, 9, 10, 11.). Accordingly the Vyavahára Mayúkha (Cap. IV, Sec. 9, Cl. 25), professing to apply the same texts and following with the greatest deference the Mitákshará, distinctly declares the sister's right to inherit. That the commentators in Bengal and Madras have excluded her proves not that their doctrine

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is the rule and that of the Mitákshará the exception. The contrary appears to be plainly the case on the express words of the Mitákshará, and still more clearly from the place which the sister occupies with the brother at partition. The strange result of any other doctrine is quite apparent. If the brother, undivided from his father, died in the life-time of that father, the right of the daughter's son to succeed to the estate in default of sons would be undoubted. Where the deceased brother is the head of a new family, being himself an ancestor, to whom, in his turn, new generations to the great grandson on the male and the grandson on the female will present the principal offering, the sister's son will not come in as a sapinda, but in the second line as offering oblations to common ancestors. Before and after partition the principle of inheritance is still the same, for Manu expressly declares the justification of partition to be the desire of multiplying sacred rites. It receives a modification consonant with the modification produced by that severance of the rites. If a sister cannot come in, neither can her son, is an argument derived from other systems of law and has no place in the logic of Hindu law. Heritable blood is a foreign importation from a foreign law, and engrafting it upon the Hindu system can only lead to further confusion and inconsistency. I have endeavoured to show this more at length on another occasion. The exception is itself an anomaly, and her exclusion on the ground of the dependence of women will no more exclude her son than the exclusion of the leper will exclude his. What is the relation to the *sacra*—is the only principle which Hindu law knows. That the sister's son is cognate to the deceased, there appears to be an express, in English unpublished, text of the Mitákshará. I should have gathered the same principle from the published words. I should equally have gathered it from the principle which I regard as undoubted, that the passive producers of offerers come in after the exhaustion of the class of males to which, by parity of degree of birth, they belong. That in the case of the daughter's son this is clear, and the daughter herself, as a specific exception, founded, doubtless, like that of the wife,

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upon equitable considerations modifying the rigid logic of the law, is allowed to come in. She produces offerers of the cake. Then as collaterals the separated brothers come in first, after them the sister who produces those who are united to the deceased, not by offering to him but by being with him joint offerers to the same ancestors. Dogmas have excluded the sister herself on general declarations as to a woman's incapacity, distinctly declared inapplicable in the case of the daughter. They would probably have been more correct if they had said that the exception to the exclusion of those not actually offerers has not been extended to her. The exclusion, however, can have no effect upon the right of the son who is an offerer and to whom the incapacity does not cling; for inherited incapacity has no place in Hindu law. I entertain no doubt that, upon authority, and still more clearly upon principle, the decree of the Lower Court should be confirmed, but, in the state of the authorities, without costs.

INNES, J.—The question before us is whether the sister's son is in the line of heirs by the Hindu law applicable to Madras, as is he decided by the Civil Judge to be upon the authority of a judgment of the High Court of Bengal in a case governed by the same law, and of the judgment of the Privy Council in *Gridhari Lal Roy* v. *The Government of Bengal.* The question seems never to have been directly decided by the High Court of Madras, and the only decision of the late Sadr Court referred to appears to be a mere dictum.

The judgment of the Privy Council in the case of *Thakoorain Sahiba* v. *Mohun Lall,* decided on the 4th March 1867, was quoted as a direct authority against the claim of the plaintiff, and it is beyond doubt an authority that a sister's son cannot inherit as a sapinda. But I join with Mr. Justice Mitter in the judgment in *Amrita Kumari Devi* v. *Lakshmi Narain Chakkarbati,* (II Ben. L. R., page 28) in thinking that for the decision of other cases in which a sister's son claims to succeed, that case is only an authority against his right to succeed as a sapinda. His counsel, though he was supposed to have abandoned, did not indeed abandon the claim, in so far as it rested upon plaintiff's

connection with deceased as a Bandhu. What was really conceded was that plaintiff could not succeed as "one of "the Bandhus or distant kindred especially enumerated in "the Mitákshará, and of whom the nearest is the father's "sister's son." The result, however, was that there was no argument and no decision as to the plaintiff's right to succeed as a Bandhu *not* specially enumerated. Of course as against the plaintiff in that suit, the decision, in dismissing his suit, negatived every basis of title, but for the decision of other cases it is, as it seems to me, only an authority upon the questions actually raised and decided. There seems to be, therefore, no authoritative decision adverse to the plaintiff's claim which precludes our considering the question whether plaintiff is entitled to succeed as a Bandhu.

The later decision of the Privy Council in *Gridhari Lal Roy* v. *The Government of Bengal* is, on the other hand, a clear authority in favor of the claim of the plaintiff to succeed as a Bandhu. The judgment of the Privy Council rests in great measure, it would seem, upon a newly translated portion of the Mitákshará relating to the succession to traders, in which a maternal uncle is expressly mentioned as a Bandhu, and I should feel bound to follow that decision without further discussion, did it not seem desirable to deduce the plaintiff's title from a consideration of the broader question of who are comprehended in the class of Bandhus.

What is the general rule of Hindu law as to the point at which inheritance, through family, terminates?

The 187th sloka of the 9th Chapter of Manu is as follows:—"to the nearest sapinda male or female after him in "the third degree the inheritance next belongs; then on "failure of sapindas and of their issue the samanodaka or "sakuliya shall be the heir or the spiritual preceptor or the "pupil or the fellow student of the deceased." Jímúta Váhana in the Dáya Bhága, Chapter XI, Section 6, para. 15, holds sakulya and samanodaka to be convertible terms. The 60th sloka of the 5th Chapter of Manu is as follows:—"Now the "relation of the sapindas or men connected by the funeral "cake ceases with the seventh person, and that of the

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"samanodakas or those connected by an equal oblation of "water ends only when their births and family names are "no longer known." Vrihat Manu, who is quoted in para. 6, Section 5, Chapter II of the Mitákshará has, instead of the words "ends only," &c. "or as some affirm it reaches as far "as the memory of birth and name extends." Now it is opvious that, according to Manu, the connection by a common libation may continue where there is connection by either birth or name, that is (transposing them) by identity of family or by affinity, and this, following the text in the 9th Chapter of Manu, v. 187, would preclude the devolution of the property on strangers until the exhaustion of all relations. But, in the way in which the rule is stated by Vrihat Manu as quoted in and followed by the Mitákshará, *both* are requisite to the continuance of the connection. That is to say as implied by the last passage in the quotation from Vrihat Manu ("This is signified by gotra or relation of family name"), Vrihat Manu and the author of the Mitákshará, following him, place such an interpretation on the text of Manu at Chapter IX, v. 187, as would devolve the inheritance upon the spiritual preceptor immediately after the exhaustion of the heirs in the gotram of deceased (to which they limit the samanodakas), to the entire exclusion of other relatives, whose rights are nevertheless recognized in the very next section of the Mitákshará. If it is once admitted that after the sapindas there are any heirs beyond the gotram, the only reasonable interpretation of the texts of Manu, Chapter IX, v. 187, and Chapter V, v. 60, is that the inheritance does not go to strangers so long as there are any surviving kindred whether of the same gotram or not. The Smriti Chandrika also makes the sakulyas identical with the samanodakas, but apparently, like the author of the Mitákshará, he limits the meaning of the term to kindred within the gotram. In para. 15, Section 5, Chapter XI, however, the author says:—"Of the kinsmen, distant kinsmen and cog- "nate kindred, in default of one that stands nearest in the "order expressly given, he that may some how be viewed "as standing on a par with him may be selected, it being "generally declared by Gautama. Let those take the in-

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"heritance who give the funeral cake, who are descendants "of the same gotra or who are sprung from the same Rishi." And this interpretation of the law is wide enough to include all who are of kin. The Vyavahára Mayúkha introduces after the samanodakas (which term this treatise also therefore uses in a limited sense) the term 'sodakhas', being the distant kindred immediately preceding the Bandhus specially so called. The text of Apastamba is also quoted, which says "If there be no male issue the nearest kinsman inherits "or in default of kindred the preceptor", showing that relations must be exhausted before the inheritance can go to strangers. Putting the Mitákshará aside for the present, all the other treatises upon Hindu law just referred to seem to disclose the intention of including as heirs in the order of propinquity all kindred, however remote, except when propinquity requires to be postponed to the superior benefits which another relationship is capable of conferring in funeral oblations. Does the Mitakshara stand alone in excluding relationships which are not expressly mentioned in the list of enumerated Bandhus ?

Now, notwithstanding the restricted interpretation which the author of the Mitákshará has, in the 5th Section of Chapter II, placed upon the before quoted text of Manu, and the limited extent of the degrees of relationship comprised within the term Bandhu under his exposition of the law, if Section 6 is to be taken as containing an exhaustive enumeration of the particular class of which it treats, there are not wanting, it seems to me, clear indications both in Section 3 and Section 7, that an exhaustion of the relations was contemplated before the inheritance could be taken by the preceptor and others not of kin. In Section III of Chapter II, para. 4, the following words occur "Nor is the "claim in virtue of propinquity restricted to kinsmen allied by "funeral oblations, but on the contrary it appears from this "very text (Manu, Chapter IX, v. 187) that the rule of propin- "quity is effectual without any exception in the case of (sa- "manodakas) kindred connected by libations of water *as well* "*as other relations* when they appear to have a claim to the "succession." Surely if the author had limited his view of the

1871. June 6. R. A. No. 72 of 1870.

succession by Hindu law to the sapindas, samanodakas within the same gotram and the enumerated cognates *alone*, he would have employed in this passage the term "the Bandhus," instead of speaking indefinitely of "other relatives "when they appear to have a claim to the succession." Then again, in Section 7 he says:—"If there be *no relatives "of the deceased*, the preceptor, &c. according to the text of "Apastamba, 'If there be no male issue the nearest kinsman "inherits or in default of kindred the preceptor'."

Again, if there be other heirs beyond the Bandhus, and the enumeration of Bandhus in Section 6 must be looked upon as exhaustive, it appears unaccountable that the exact positions in the order of inheritance of the "other relatives" mentioned in Section 3, and the remaining relatives mentioned in Section 7, who are to inherit before the preceptor, have not been distinctly specified; and this is, I think, an additional ground to those already given in the judgment of Mr. Justice Mitter before quoted, and in that of the Privy Council in *Gridhari Lal Roy* v. *The Government of Bengal* for holding that the list of Bandhus in Section 6 was not intended to be complete. It appears to me that the quotation containing the list of Bandhus was made by the author to illustrate the three classes, and the order in which they took the inheritance, and that the term Bandhus in the Mitákshará, which in the ordinary sense means relations in general, in a technical sense signifies mere relations, *i. e.*, those who are not sapindas, or of the same gotram, and includes all the remoter relations referred to in Sections 3 and 7, and to whom a defined position in the line of heirs has not been specifically assigned. A person in the position of the plaintiff in respect to the deceased, as has been well pointed out by Mr. Justice Mitter, is in one sense a sapinda. He becomes a sapinda of his mother's brother from being a sapinda of his mother's father, as they both offer oblations to a common ancestor, but he is only a sapinda to his mother's father for special purposes, and the right of offering oblations in the family of his mother's father does not extend to his son. He is not, therefore, on a footing with the ordinary near or remote sapindas, and, as has been

decided by the Privy Council, cannot inherit as a sapinda. He is, therefore, one of the remoter kinsmen. As not belonging to the same gotram as his maternal uncle, he is not—in the stricter sense in which the term is used by the Mitákshará, Smriti Chandrika and other writers—one of the samanodakas, and he is there properly a mere Bandhu, and it is notorious that this is the popular designation of the relationship throughout Southern India. As a Bandhu he is entitled before any more remote relative, and necessarily before one who is no relative.

1871. July 6. R. A. No. 72 of 1870.

Following the decision of the Privy Council in *Gridhari Lal Roy* v. *The Government of Bengal*, I would confirm the decision of the Civil Judge and dismiss this appeal.

Appellate Jurisdiction (a)

Special Appeal No. 23 *of* 1871.

RANI KATTAMA NA'CHIA'R......*Special Appellant.*

BOTHAGURUSA'MI TE'VAR.........*Special Respondent.*

Plaintiff, the Zamindární of Shivaganga, sued to recover two villages which she alleged formed part of the Shivaganga Zamindárí. The villages originally belonged to Pitchama Náchiár, mother of the present defendant, Bothagurusámi Tévar, the ex-Zamindár of Shivaganga. In 1856 they were purchased by the Court of Wards on behalf of Bothagurusámi who was then a minor, with part of the rents and profits of the Zamindárí, and in 1860 were given by him to his mother. In 1864 Bothagurusámi was ousted by a decree of the Privy Council and became liable to the present plaintiff for the mesne profits of the Zamindárí. In the account taken of mesne profits due, the amount expended on the purchase of these villages was excluded by plaintiff's consent from the sum debited to the ex-Zamindár. Plaintiff now sued Pitchama Náchiár, and, she dying, the suit was continued against Bothagurusámi, as her representative. *Held*, that the plaintiff was not entitled to maintain the suit. The decree of the Privy Council did not directly give the plaintiff a right to maintain the suit, for the adjudication of the Zamindárí related only to the permanently settled estate acquired under the Istimrári Sannad of the Madras Government; and even if it could be said to include the villages in dispute, process of execution would, under Section 11, Act XXIII of 1861, be the plaintiff's only remedy. There was but one ground upon which the suit could be supposed to lie, namely, the existence of the relation of trustee and beneficiary between the Collector and the plaintiff at the time of the purchase, and such relation did not exist.

THIS was a Special Appeal against the decision of J. D. Goldingham, the Civil Judge of Madura, in Regular Appeal No. 92 of 1869, reversing the Decree of the Court of the Principal Sadr Amín of Madura in Original Suit No. 58 of 1868.

1871. July 11. S. A. No. 23 of 1871.

(a) Present:—Scotland, C. J. and Innes, J.

1871. July 11. S. A. No. 23 of 1871.

The plaintiff in this suit sought to recover from the defendant the villages of Arasakulam and Korisakulam permanently settled, and paying in the Shivaganga Zamindárí a quit rent of Rupees 279-4-9 to Government, and Rupees 2,964-12-5 as arrears of rent of the said two villages for Faslís 1273 to 1276.

The plaint stated that the said villages were held on Darmasanum tenure and formed part of the Shivaganga Zamindárí, from the revenues whereof they were purchased in 1856 by the Court of Wards who had the management of the same, although they were bestowed on the defendant by the ex-Zamindár in 1860; that the plaintiff wanted to take possession of the villages, but was prevented by the defendant. Hence the suit.

The defendant denied the plaintiff's right to the villages in question, and pleaded that her claim to the produce of Faslis 1273 and 1274 was barred by the Law of Limitation.

The Principal Sadr Amín found that the villages were purchased from the mesne profits to which the plaintiff was entitled under a decree of the Privy Council, and that her claim for the profits of Faslis 1273 and 1274 was barred by the Law of Limitation, and, under this view, awarded the villages to the plaintiff with the profits of the same for Faslis 1275 and 1276, and from 1277 till the date of delivery, the value being determined at the time of executing the decree.

From this decree the defendant appealed.

The Civil Judge, reversing the decree of the Principal Sadr Amín, said in his judgment :—

" The villages, the subject of this suit, were purchased in the year 1855 by the agent to the Court of Wards, out of the revenues of the Shivaganga Zamindárí, for the deceased defendant Pitchama Náchiár at the express desire of the ex-Zamindár, her son and present representative. They were next made over to the ex-Zamindár in 1859, when he attained his majority and was put in possession of the Zamindárí, and in 1860 they were formally made over by him

to his mother the said defendant. In 1864 the ex-Zamindár was ousted by the decree of the Privy Council, and in 1865 an account, Exhibit C, was prepared by this Court shewing the sums due to the plaintiff as mesne profits. In this account the amount expended on the purchase of these villages was excluded by plaintiff's consent from the sums debited to the ex-Zamindár, and the question now is whether she is entitled to recover them from Pitchama Náchiár. The Principal Sadr Amín has decreed in plaintiff's favor, but I am clearly of opinion that his decree cannot be sustained.

Referring to the decree in question, I find that plaintiff was declared entitled to recover the Zamindári and such sums as might be found due upon account from the death of Angamuttu Náchiár. Now it is admitted that these villages did not form part of the corpus of the Zamindári, and as for the sums due on account of mesne profits, their amount was determined by an order of the Court passed in execution. All that plaintiff was entitled to in respect of this transaction was the amount of the purchase money, and her having waived her right to it then, under, perhaps, a mistaken impression, does not give her power now to come down upon Pitchama Náchiár. Had the villages formed part of the Zamindári, the case would of course have been different, but, as the matter stands, I cannot see how Pitchama Náchiár can be compelled to make restitution. The gift was complete in itself at the time in question, for the ex-Zamindár had divested himself of all right to the property ; and having been made when he was apparently their rightful owner, it cannot be impeached on the ground of fraud, nor does the fact of the donee being his mother in any way affect the question.

It seems clear to me that the decree of the Lower Court is wrong and must be reversed—all costs being borne by the plaintiff."

The plaintiff preferred a special appeal on the ground that the village, being admittedly purchased for the Zamin of Shivaganga by the Court of Wards from its proceeds while under their management, formed a part of the Zamin, and fell with it to the plaintiff's inheritance.

1871. July 11. S. A. No. 23 of 1871.

Karunákara Ménon for the special appellant, the plaintiff.

The Acting Advocate General for the special respondent, the defendant.

The Court delivered the following judgments:—

Scotland, C. J.—This is a suit by the Zamindární of Shivaganga to recover two villages, together with mesne profits from Fusly 1273 to Fusly 1276. The Lower Appellate Court, reversing the decree of the Court of First Instance, held that the plaintiff had no title to the villages and dismissed the suit, and whether the Court was wrong in so deciding is the question for determination in the Special Appeal.

The facts are,—that the villages are held on Darmasanum tenure and were the property of the now defendant's deceased mother, against whom the suit was originally brought, when in 1855 they were sold in execution of a decree. At that time her son (the defendant) was a minor under the guardianship of the Court of Wards, and the Zamindárí of Shivaganga was managed by the Collector, in his capacity of Agent of the Court of Wards, for the defendant's benefit as the rightful owner in succession to his father; whose proprietary title, as the heir of the plaintiff's father, had been declared valid by a then subsisting decree of the Civil Court of Madura passed in 1847. At the request of the defendant and with the sanction of the Court of Wards, the Collector purchased the villages in dispute for Rupees 12,105, out of the accumulated savings from the income of the Zamindárí in his charge. In 1859 the defendant's minority ceased and he was put in possession of the Zamindárí and the said villages: and in the same year his right as heir to the Zamindári was upheld by a decree of that Court in a suit brought by the present plaintiff to eject him, which decree was affirmed in an appeal to the Sadr Court. In 1860 he made a complete gift of the villages to his mother, and from that time she continued in the enjoyment of them as owner until her death, which has taken place since the institution of the present suit. She

was succeeded by her son, who was then made defendant in the suit. In 1863 the decrees against the plaintiff were reversed on appeal to the Privy Council and, by the order of Her Majesty in Council, the plaintiff was declared, as against the defendant, entitled to recover the Zamindárí, and it was directed that an account should be taken of the rents and profits of the Zamindárí received by the defendant, or by his order, or for his use since the death of Angamuttu Náchiár, and that the amount found due should be paid by the defendant. In execution of that order the plaintiff was put in possession of the property forming the Zamindárí estate granted by the Istimrári Sannad, and an account was taken of the mesne profits and the amount due to the plaintiff ascertained. But on the taking of such account no claim was made by the plaintiff, nor was any sum allowed to her on account of the purchase money of the villages in dispute.

1871. July 11. S. A. No. 23 of 1871.

There can be no doubt that the order does not directly give the plaintiff a right to maintain the suit, for, in the first place, it is clear that the adjudication of the Shivaganga Zamindárí relates only to the permanently settled estate acquired by Gauri Vallabha Tévar under the Istimrári Sannad granted by the Madras Government. And in the next place, if it could be said to include the villages in dispute, process of execution would, under Section 11, Act XXIII of 1861, be the plaintiff's only remedy for their recovery.

There is, it appears to me, but one ground upon which the suit could be supposed to lie, and that is the existence of the relation of trustee and beneficiary between the Collector and the plaintiff at the time of the purchase. If that had been established, then I have no doubt the plaintiff would have had a right to maintain the suit upon the ground of a resulting trust, attaching to the villages by operation of law, in the hands of both the defendant and his mother.

But I think that the relation of trustee and beneficiary, necessary to give rise to such a trust, cannot be said to have existed in regard to the fund applied to the purchase of the villages. At the dates of the purchase by the Collector and the gift to the defendant's mother, the decrees declaring the

1871. July 11. S. A. No. 23 of 1871.

defendant's right to the Zamindári and the funds held in trust by the Collector were in force : and this alone would, probably, have been a ground for deciding against the existence of such a relation. But supposing the reversal of those decrees by the Privy Council to exclude them altogether from consideration, I think the decree of the Privy Council is itself fatal to the maintenance of the suit upon the ground of the existence of such a relation of trustee and beneficiary and resulting trust in favor of the plaintiff. The adjudication thereby made as to the right of the plaintiff to and the liability of the defendant for the mesne profits of the Zamindári from Angamuttu's death, in effect determined the relation between them to be that of judgment-creditor and debtor for such sum as should be found due on the taking of an account. Assuming, therefore, what at present is not apparent in the record, that none of the rents and profits due before the death of Angamuttu went to make up the fund applied to the purchase of the villages, I think that such a relation and trust is quite incompatible with the decree, and that the plaintiff's only right under it was to make the amount of the purchase money a part of the debt due on account of mesne profits and enforce payment against the defendant as a judgment debtor.

For these reasons I am of opinion that the decree of the Lower Appellate Court should be affirmed and the appeal dismissed, but without costs.

Innes, J.—I concur. We must look in this case to what was taking place not at the time of the gift, but at the time of purchase. The purchase was in 1855, and it is clear that there was then no *lis pendens*, for the present defendant (the ex-Zamindár) then held possession of the Zamindári as the person who had successfully resisted the various claims made to the estate which had been disposed of unfavourably to the claimants by unappealed decrees of the Sadr Court; and the litigation which sprung up again in 1860 took the form of a fresh suit, not of a continuation of the former proceedings.

I would not, however, be understood as saying that if this had been a case of *lis pendens*, that circumstance would

necessarily have conferred on plaintiff the right to the specific property into which the funds have been converted. There were, further, no circumstances in the case to give rise to the relation of trustee and beneficiary between the Court of Wards who acted for the ex-Zamindár, then a minor, and the plaintiff, the person who was eventually declared to be the rightful successor. But even assuming that the principles laid down in *Taylor* v. *Plumer* (3. M. & S. 574) could be applied by holding that the plaintiff has a right to follow the specific property into which the purchase money has been converted, it seems that the plaintiff's remedy, if indeed she can now recover at all, is in execution and not by separate suit, for her right to recover must rest upon the villages representing mesne profits in another shape, and, as she has a decree for the mesne profits which she is entitled to recover, she must execute that decree to enable her to recover them. I agree in dismissing the special appeal without costs. *Appeal dismissed.*

1871. *July* 11. *S. A. No.* 23 *of* 1871.

Appellate Jurisdiction. (a)

Special Appeal No. 273 *of* 1871.

LATCHMANA RAU SAIB, by his mother and guardian SUNDARA BAYI SAHIBA .... } *Special Appellant.*

RAGUNATHA RAU and another...*Special Respondents.*

The Court of First Instance refused to grant plaintiff's application to be allowed to examine 2nd defendant as a witness on her behalf, thinking the grounds of such application insufficient for the exercise of its discretion under Section 162 of the Civil Procedure Code. On the adjourned date of hearing plaintiff failed to produce any other witness and the suit was dismissed under Section 148. On Regular Appeal, the Civil Judge considered that the Court of First Instance ought not to have refused plaintiff's application, but held that the refusal was a final order not open to question in appeal. On special appeal, *Held*, that the Civil Judge was wrong on the latter point. That if the plaintiff had been prevented from examining the 2nd defendant on insufficient grounds, she had not committed default under Section 148; that the decree on the finding of the Civil Court was not maintainable without enabling plaintiff to examine 2nd defendant and that that finding was conclusive in the special appeal. The decrees of both the Lower Courts were consequently set aside and the case remanded.

THIS was a special appeal against the decision of C. G. Plumer, the Acting Civil Judge of Chittúr, dismissing Regular Appeal No. 124 of 1870, presented against the decree

1871. *July* 21. *S. A. No.* 273 *of* 1871.

(a) Present :—Scotland, C. J. and Innes, J.

1871. July 21. S. A. No. 273 of 1871.

of the Court of the District Munsif of Arni, in Original Suit No. 335 of 1869.

Anandacharlu for the special appellant, the plaintiff.

Sanjiva Rau for the 2nd special respondent, the 2nd defendant.

The facts sufficiently appear in the following

JUDGMENT:—In this case the Court of First Instance refused to grant the application of the plaintiff to be allowed to examine the 2nd defendant as a witness on her behalf, thinking the grounds of such application insufficient for the exercise of its discretion under Section 162 of the Code of Civil Procedure; and as, on the adjourned date of hearing, the plaintiff failed to produce any other witness, the Court dismissed the suit under Section 148 of the Code. The Judge who heard the regular appeal was of opinion that no good ground had been shown for the refusal of the Court of First Instance to compel the attendance of the 2nd defendant, and that the 2nd defendant appeared to be a material witness for the plaintiff and ought to be examined. But he considered the refusal to be a final order not open to question in the appeal, and that the plaintiff was without redress.

On this latter point the Civil Judge was clearly wrong. If the plaintiff had been prevented by the order of the Original Court from examining the 2nd defendant as a witness on insufficient grounds, she had not committed default within the meaning of Section 148, and the suit had not been properly heard and determined. Consequently, the decree, on the finding of the Civil Court, was not maintainable without enabling the plaintiff to lay the evidence of the 2nd defendant before the Court, and that finding is conclusive in the special appeal.

The result is that the decrees of both the Lower Courts must be set aside, and the proper course, we think, is to reverse them and remand the suit to the Original Court, in order that the 2nd defendant's examination as a witness for the

plaintiff may be taken, and the case fully heard and determined upon the evidence of that and any other witness whom either party may produce.

1871. *July* 21. *S. A. No.* 273 *of* 1871.

We think the costs in the special appeal and the costs hitherto, in both the Lower Courts, should be paid by the party who fails in the Court of First Instance.

Appellate Jurisdiction. (*a*)

Special Appeal No. 140 *of* 1871.

TAMMIRA'ZU RA'MAZOGI...... *Special Appellant.*

PANTINA NARSIAH .... *Special Respondent.*

Suit brought in 1868 to establish that plaintiff had vested in him the right to the office of karnam of certain villages, from which he had been ousted by the defendant in 1857, and to recover from defendant the mirási lands annexed to the office. The Court of First Instance decreed for plaintiff. The Civil Court reversed this decision on the ground that title to the office was the principal matter of the plaintiff's claim, and the right to possession of the land merely an incident dependent upon that title ; that therefore, as the period of limitation applicable to the former claim (6 years) had elapsed before the institution of the suit, it was not maintainable for the land. Upon Special Appeal, the decree of the Civil Court was affirmed, on the grounds that it was conclusively found that the land was inseparably attached to the office as a source of endowment for the services of the holder of it for the time being, and that, as against the plaintiff, the defendant was protected in the possession of the office by Clause 16, Sec. 1 of the Act of Limitations.

1871. *August* 4. *S. A. No.* 140 *of* 1871.

THIS was a Special Appeal against the decision of F. C. Carr, the Acting Civil Judge of Vizagapatam, in Regular Appeal No. 76 of 1869, reversing the decree of the Court of the Principal Sadr Amín of Vizagapatam in Original Suit No. 2 of 1868.

The suit was brought for the re-establishment of the plaintiff's right to the office of karnam of the villages of Vanam and Rakhundyan within the Zamindári of Bobbili, and also to recover possession of the mírási lands attached to the office, together with mesne profits.

The plaintiff alleged himself to be the *de jure* registered karnam of those villages, and asserted that he exercised the office and enjoyed the lands up to 1857, when he was ousted by the defendant.

(*a*) Present :—Scotland, C. J. and Kindersley, J.

1871. August 4. S. A. No. 140 of 1871.

The defendant denied the right of the plaintiff to the land, and pleaded that up to 1857, when the plaintiff was performing the duties, he was doing so merely as his (defendant's) representative, and that he himself was the rightful karnam.

The Principal Sadr Amín decided in favour of the plaintiff, establishing his right to the office, and ordering the restoration to him of all the lands and the mesne profits as sued for, and the costs.

Against this judgment the defendant appealed, again urging the same pleas, and further pleading that the plaintiff's claim was barred by lapse of time.

The Civil Judge in his judgment said—"This most important objection was not raised in the Lower Court, nor was it even one of the grounds set forth in the defendant's appeal petition. The defendant, however, was permitted to plead the Statute, for the question of limitation rested entirely upon the admitted facts.

The plaintiff admits that he was ousted from his lands and the office of karnam on the 28th January 1857, and his suit was filed in January 1868, nearly eleven years after. The plaintiff's pleader says that as this is a suit for an interest in immoveable property, the suit falls under Clause 12, Section 1 of the Statute, and may be brought within twelve years. I am unable to agree in this view of the case. This suit is not a suit brought for an interest in immoveable property, but it is a suit brought to establish the plaintiff's claim to the office of karnam, and as the lands are attached to such office of karnam, an interest in them forms an incident in this suit; but is not the primary object of the suit. The enjoyment of these mírási lands is the salary of the office, and as such belongs to the office-holder." He, therefore, reversed the decree of the Lower Court.

The plaintiff preferred a special appeal on the ground that the suit was not barred.

Ráma Rau for the special appellant, the plaintiff.

Sloan for the special respondent, the defendant.

1871. August 4. S. A. No. 140 of 1871.

The Court delivered the following

JUDGMENT:—This is a Special Appeal arising out of a suit brought to establish that the plaintiff had vested in him the right to the office of karnam of the villages of Vanam and Rakhundyan, within the Zamindári of Bobbili, from which he had been ousted by the defendant in the year 1857, and to recover from the defendant the mírási lands annexed to the office as a provision for the person holding such office, together with mesne profits.

The Court of First Instance declared the right to the office to be in the plaintiff, and ordered the defendant to deliver to him possession of the lands and pay an amount on account of mesne profits. The Civil Court reversed this decision in the Regular Appeal, and decreed the dismissal of the suit, on the ground that title to the office was the principal matter of the plaintiff's claim, and the right to possession of the land was merely an incident dependent upon that title; and therefore, as the period of limitation applicable to the former claim (six years) had elapsed before the institution of the suit, it could not be maintained for the recovery of the land.

The Civil Judge was, no doubt, correct in the position that the right to the land was a secondary claim in the suit, and dependent upon the plaintiff's title to the office of karnam, and we think his conclusion, that the lapse of six years from the time of the alleged ouster by the defendant was fatal to the maintenance of the suit to recover the land, is sustainable. We rest this decision upon the grounds that it is conclusively found that the land was inseparably attached to the office as a source of endowment for the services of the holder of it for the time being, and that, as against the plaintiff, the defendant was protected in the possession of the office by Clause 16, Section 1 of the Act of Limitations. Being precluded from setting up a claim to be admitted to the office, the plaintiff necessarily failed to show him self entitled to recover possession of the land.

The decree of the Lower Appellate Court must be affirmed with costs.

Appeal dismissed.

Appellate Jurisdiction. (a)

Special Appeal No. 171 *of* 1871.

RA'MANA'DAN CHETTI..............*Special Appellant.*
KUNNAPPU CHETTI..............*Special Respondent.*

Suit brought to recover the amount to which plaintiff was entitled under a decree passed in favor of himself and defendant as co-plaintiffs in a former suit. It appeared that defendant purchased the property sold in execution of the decree and that the price for which the sale took place was sufficient to satisfy the decree. Instead of paying the purchase money into Court, defendant, with the knowledge and assent of plaintiff, retained the whole sum upon the understanding that he should give the Court a receipt for himself and on behalf of plaintiff, and afterwards pay to plaintiff his portion of the amount decreed. Accordingly defendant presented a petition to that effect and obtained a certificate confirming the sale. Defendant having failed to pay plaintiff his portion, the present suit was brought. Upon these facts, it was *Held*, in Special Appeal, that the decree was satisfied by sale of the judgment debtor's property and that the execution proceedings were completely at an end, the defendant having been, by the assent of the plaintiff, made his agent for the acknowledgment of the satisfaction of the decree. No subsequent application under the decree could have been entertained by the Court which executed it. Therefore plaintiff's claim was not a matter determinable under Sec. 11 of Act XXIII of 1861.

1871. *August* 16. S. *A. No.* 171 *of* 1871.

THIS was a Special Appeal against the decision of J. D. Goldingham, the Civil Judge of Madura, in Regular Appeal No. 83 of 1869, confirming the Decree of the Court of the Principal Sadr Amín in Original Suit No. 129 of 1868.

The plaintiff as one of two plaintiffs in Suit No. 125 of 1866, on the file of the Principal Sadr Amín of Madura, sued for the recovery from the defendant (the other plaintiff) of Rupees 1,199-15-8 as principal and interest, together with further interest.

The plaintiff stated that the defendant purchased, for Rupees 1,700, a house and ground belonging to one Gopál Ayyan, which was sold in public auction on account of the judgment-debt due by him in the said suit to the plaintiff and the defendant, but that defendant failed to pay plaintiff his share of the purchase money, in proportion to the amount due to him under the bond on which the said suit was based.

The defendant admitted the purchase, and stated that the plaintiff was entitled simply to a moiety of the house so purchased by him; at the same time, he gave a deposition

(a) Present :—Scotland, C. J. and Innes, J.

admitting that out of Rupees 2,545-7-10, the judgment-debt in the said suit, he (defendant) was entitled to Rupees 1,070, and the plaintiff to Rupees 1,475-7-10.

1871. *August 16.* *S. A. No.* 171 *of* 1871.

The Principal Sadr Amín held that the defendant having made the purchase on behalf of himself, the plaintiff was bound to give him so much of the purchase money as appertained to his share, and, in this view, directed the defendant to pay plaintiff Rupees 991, together with interest Rupees 208-15-8, or Rupees 1,199-15-8 in all.

Upon appeal the Civil Court confirmed the decree of the Principal Sadr Amín.

The defendant preferred a special appeal upon the ground that, by Section 11 of Act XXIII of 1861, the question involved in this suit should have been decided in execution of the decree in Original Suit No. 125 of 1866, and not by separate suit.

Handley for the special appellant, the defendant.

Karunákara Ménon for the special respondent, the plaintiff.

The Court delivered the following

JUDGMENT:—This appeal arises out of a suit brought to recover the amount to which the plaintiff was entitled under a decree passed in Original Suit No. 125 of 1866, in favor of himself and the defendant as co-plaintiffs in the suit; and the question is whether the suit lay for the amount.

It appears that the defendant became the purchaser of the property sold in execution of the decree, and that the price for which the sale took place was sufficient to satisfy the decree. Instead of paying the purchase money into Court in the strictly regular course, the defendant, with the knowledge and assent of the plaintiff, retained the whole sum upon the understanding that he should give a receipt to the Court for himself and on behalf of the plaintiff, and afterwards pay to the plaintiff his portion of the amount decreed. Accordingly the defendant presented a petition to

1871. August 11. S. A. No. 171 of 1871.

that effect to the Court and obtained the necessary certificate confirming the sale to him.

The defendant having failed to pay the plaintiff the amount of the judgment-debt to which he was entitled, he brought the present suit.

It appears to us that Section 206 of Act VIII of 1859 is clearly not applicable to the case, and the only point to be considered is, whether the suit is prohibited by Section 11 of Act XXIII of 1861. Upon the facts as stated it must be held that the decree was satisfied by sale of the judgment-debtor's property, and that the execution proceedings were completely at an end, the defendant having been, by the assent of the plaintiff, made his agent for the acknowledgment of the satisfaction of the decree. No subsequent application under the decree could, we think, have been entertained by the Court which executed it. The claim of the plaintiff, therefore, to the amount in effect received for him by his co-plaintiff (the defendant), was not a matter determinable under Section 11 of Act XXIII of 1861.

For these reasons we are of opinion that the suit is maintainable and that the decree of the Lower Appellate Court must be affirmed with costs. We are not to be understood as assenting to the view expressed in the 9th paragraph of the Civil Judge's judgment, that the words "questions arising between parties," &c., in Section 11 of Act XXIII of 1861, are limited in their meaning to questions between plaintiffs and defendants. It is unnecessary to decide the point.

Appeal dismissed.

Appellate Jurisdiction. (a)

Special Appeals Nos. 241, 242, 243 *and* 244 *of* 1871.

KARYAN.......*Special Appellant in Nos.* 241 *and* 242.

PERIA SIDDEN and another.........*Special Appellants in No.* 243.

LINGA GAUNDAN...... ....*Special Appellant in No.* 244.

DODDALI and 3 OTHERS..............*Special Respondents.*

Suits for a declaration of title to a divided share of ancestral property. The ground alleged in each case for seeking the declaration was that the representatives of the brothers of the plaintiff's father had refused to be parties to the registering of the property in plaintiff's name and had executed a deed of sale of it to a third party (3rd defendant) and registered him as the purchaser. The Court of First Instance, in each case, decreed for the plaintiff. The Appellate Court, following the case reported at 2 M. H. C. R. 333, dismissed the suits on the ground that the plaintiffs were not in a position to maintain them. On Special Appeal *Held*, that the suits should be remanded for a declaration of the plaintiffs' title, if established. The principle upon which the decision reported at 2 M. H. C. R. 333 proceeds, is inapplicable to suits under Sec. 15 of the Civil Procedure Code.

To maintain a suit for a declaration of title, some adverse act intended and calculated to be prejudicial to the title which the plaintiff seeks a declaration of, must appear to have been done by the defendant. The mere denial of the title, or doing an act which causes annoyance or cannot imperil the plaintiff's title, nor have any serious effect on the quiet enjoyment of his proprietary right, is not sufficient to support such a suit.

1871. *August* 4. *S.A. Nos.* 241, 242, 243 *and* 244 *of* 1871.

SPECIAL Appeals against the decrees of E. F. Eliott, the Civil Judge of Salem, in Regular Appeals Nos. 38, 39, 40 and 41 of 1870, reversing the decrees of the Court of the District Munsif of Tripatúr in Original Suits Nos. 320, 321, 322, and 364 of 1868, respectively.

These were suits brought to declare plaintiffs' right to certain shares of property in dispute, also for a transfer of registry into plaintiffs' names.

The pleadings and evidence were similar in all the suits.

In Special Appeal No. 241 of 1871 the plaintiff claimed ¼ share of the plaint property as inherited by him from his father, to whose share it fell in a division of family property, and by whom it was enjoyed and possessed until his death, when he was succeeded by plaintiff, in whose possession and enjoyment it continued up to date of suit.

(a) PRESENT:—Scotland, C. J. and Innes, J.

1871. August 4. S.A. Nos. 241, 242, 243 and 244 of 1871.

The defendants 1 to 4 pleaded that the whole of the lands in issue fell to the shares of 1st defendant's husband and 2nd defendant in a division of family property, and not to plaintiff's father's share, as alleged by him, but that other lands not in issue, No. 8, fell to plaintiff's father's share; that they sold these plaint lands to 3rd defendant, who again sold them to 4th defendant.

The District Munsif held the plaintiff to have established his right of title, and that 4th defendant's right under his purchase could only hold good to the extent of 1st and 2nd defendants' share which amounted to $\frac{1}{14}$th + $\frac{1}{18}$th of the properties in issue. He accordingly adjudged for plaintiff as sued for with entire costs of suit as against 1st and 2nd defendants.

The supplemental 4th defendant appealed.

The Civil Judge in reversing the decision of the Munsif said,—

"The question is whether plaintiff is in a position to sue, being in possession intact and uninvaded. The Court holds in the negative in accordance with the decision of the High Court in the case reported at 2 M. H. C. R. 333.

There is no apparent foundation for this suit in the opinion of the Court; there is nothing to show that any consequential relief is sought for by plaintiff, and he is admittedly in full possession of all his alleged rights intact and uninvaded, and therefore not in a position to bring this action."

This was also the judgment of the Court in the other suits.

The plaintiff in each suit preferred a special appeal.

Powell for the special appellants in Nos. 241 to 244, the plaintiffs.

Handley for the special respondents in Nos. 241 to 244, the defendants.

The Court delivered the following

JUDGMENT:—This is a suit to obtain a declaration of the plaintiff's title to a divided share of certain ancestral property, and the ground alleged in the plaint for seeking

such declaration is that the 1st defendant's husband and the 2nd defendant, who are the representatives of the brothers of the plaintiff's father, had refused to be parties to the registering of the property in plaintiff's name, and had executed a deed of sale of it to the 3rd defendant and registered him as the purchaser.

1871. *August* 4. *S. A. Nos.*241, 242, 243 *and* 244 *of* 1871.

The Court of First Instance decreed the declaration as prayed, but that decree was reversed by the Lower Appellate Court and the suit dismissed upon the ground that the plaintiff was in possession and enjoyment of the property, and therefore not in a position to maintain a suit for a declaration of his title. The question for determination is whether this decision is wrong, and we are of opinion that it is. The Civil Judge has acted upon the decision reported in 2 M. H. C. R. 333. That decision proceeded upon the principle of English Procedure, that to maintain a suit for declaration of title, the suit must be such as consequential relief could be granted in. But subsequent decisions have shown that principle to be inapplicable to suits under Section 15 of the Code of Civil Procedure.

What we consider to be the sound principle recognized by the recent decisions is, that to maintain a suit for a declaration of title, some adverse act, intended and calculated to be prejudicial to the title which the plaintiff seeks a declaration of, must appear to have been done by the defendant. The mere denial of the title, or doing an act which causes annoyance but cannot imperil the plaintiff's title, nor have any serious effect on the quiet enjoyment of proprietary rights, is not sufficient to support such a suit.

Applying that principle to the present case, we think that the plaintiff was clearly entitled to bring the suit. The obvious effect of the defendants' acts was to make evidence to support a right in the defendants adverse to the plaintiff's title, which would be seriously prejudicial to the plaintiff's recovery of the property if the defendants at any time got possession of it, or chose to set up a false case of possession, and the circumstances of the entire family property lying together and having been recently jointly enjoyed would facilitate their doing so.

For these reasons the decree of the Lower Appellate Court must be reversed and the suit remanded for the deter-

1871. August 4. S. A. Nos. 241, 242, 243 and 244 of 1871.

mination of the questions raised in the regular appeal and the declaration of the plaintiff's title, if established. We think the costs in the Special Appeal should be paid by the party who succeeds in the Regular Appeal, and that the costs, hitherto, in both the Lower Courts, should abide the decree of the Lower Appellate Court.

In S. A. Nos. 242, 243 *and* 244 *of* 1870.—The questions in these Special Appeals are the same as that in Special Appeal No. 241 of 1871, and they must be disposed of in accordance with our Judgment in that Appeal.

Appellate Jurisdiction. (a)

Regular Appeal No. 37 *of* 1870.

STRIMUTTU MUTTU VIZIA RAGUNA'DA RANI KOLUNDAPURI NA'CHIA'R, *alias* KATTAMA NA'CHIA'R, Zamindární of Shivaganga, and 4 others. } *Appellants.*

DORASINGA TE'VAR *alias* GAURI VALLABA TE'VAR. } *Respondent.*

The plaintiff, as the eldest surviving male representative of the Istimrár Zamindár of Shivaganga, sued for a declaratory decree establishing his right to succeed to the zamindárí upon the death of the 1st defendant; and for maintenance. Plaintiff was the eldest surviving son of the only daughter of the Istimrár Zamindár by his senior wife. The 1st defendant, the Zamindární, was the youngest of his two daughters by his 3rd wife. He had also a daughter by his 2nd wife and another by his 6th wife. 1st defendant obtained possession of the zamindárí under an order of Her Majesty in Council which established the right of the daughters of the Istimrár Zamindár to succeed to the zamindárí on the death of his surviving widow Angamuttu, without prejudice to the rights of the 1st defendant and her sisters *inter se*. When 1st defendant obtained possession, she was the only survivor of the Zamindár's 5 daughters. The plaintiff's mother and the daughter by the 6th wife predeceased Angamuttu, and the daughter by the 2nd wife and the 1st defendant's uterine sister survived Angamuttu. Beside the plaintiff's mother the 1st defendant's uterine sister was the only one of the deceased daughters who had issue, and her only child, a son, died issueless some years before 1st defendant had established her right to the zamindárí. Before Angamuttu's death the 1st defendant was twice married and had issue, by her 1st husband the 3rd defendant, and by her 2nd husband the 2nd, 4th and 5th defendants. The Civil Court made the declaratory decree prayed for, but refused maintenance. The defendants appealed upon the grounds.—That the present was not a case for a declaratory decree. But, if it were, the decree should have declared either that the 1st defendant's son (2nd defendant) had the preferable right, or that the zamindárí was stridhanam property of the 1st defendant, and that, therefore, her daughters were her rightful successors. *Held*, that the plaintiff had a right to institute the suit. That the daughters of the 1st defendant were not her rightful successors to the zamindárí, and that the plaintiff, as the eldest grandson of the Istimrar Zamindár, was entitled to be, preferably to the 2nd defendant, declared reversionary heir to the zamindárí on the death of the 1st defendant.

(a) Present;—Scotland, C. J. and Holloway, J.

According to Hindu Law when the sons of daughters succeed to the property of their grandfather, they take by direct right of succession, as being his nearest heirs, like the sapindas of a man succeeding to his property on the death of his widow, but *per Capita*. The rule of succession exists as laid down in the Dáya Bhága, " a fortiori in the case of the daughter and grandson whose pretensions are inferior to the wife's" ; and it rests upon the great principle of the entire Hindu Law of succession to property, that nearness in regard to the attributed capacity and sacred duty to confer spiritual benefits by the offering of funeral oblations, either immediately or mediately, confers the right to inherit temporal wealth.

Unmarried or married daughters, on whom as a class paternal property devolves, take a joint life interest with rights of survivorship. The estate of inheritance passes from their father to the sons of all the daughters as his nearest heirs; and on the death of the last surviving daughters the sons take the property equally.

1871. *October* 27. *R. A. No.* 37 *of* 1870.

THIS was a regular appeal against the decision of J. D. Goldingham, the Civil Judge of Madura, in Original Suit No. 2 of 1869.

The plaintiff, as the eldest surviving male representative of the Istimrár Zamindár of Shivaganga, sought for a declaratory decree establishing his right to succeed to the said zamindári as next heir upon the death of the 1st defendant, and adjudging her to pay him Rupees 60,000 per annum for maintenance; and further declaring his right to immediate possession of certain apartments in the palace of the zamindári, which belonged to his maternal grandmother and mother, and in which they resided during their life-time. The plaint alleged that the 1st defendant was put into possession of the said zamindári by virtue of the decree of Her Majesty in Council, bearing date the 30th November 1863, as the sole surviving daughter of Gauri Vallaba Tévar, otherwise called the Istimrár Zamindár; that he had seven wives, of whom three survived him, viz. Angamuttu, Muttu Virayi and Parvada Varthani Náchiár; that he (Gauri Vallaba) had by his first wife (Raku Náchiár) one daughter named Vella Náchiár, who was married to Udiana Tévar in the life-time of her father and gave birth to four sons, namely, Muttu Vaduga Tévar,† Dili Pasha Tévar,† plaintiff, and Sámi Tévar,† and a daughter, all of whom were born in the life-time of the said Gauri Vallaba Tévar; that the said Gauri Vallaba Tévar at his death left also four daughters besides the said Vella Náchiár, all of whom afterwards died without issue, with the exception of the 1st defendant; that the 1st defend-

† Who died before this suit was brought.

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ant was twice married, first to Sandana Tévar, by whom she had one daughter, the 3rd defendant, and secondly, to Chinna Tévar, by whom she had two daughters, the 4th and 5th defendants, and one son, the 2nd defendant; that the 3rd, 4th, and 5th defendants were childless widows, and the 2nd defendant a minor of the age of 13 years; that the zamindári was impartible and capable of enjoyment by only one member of the family at a time, and that the plaintiff, as the eldest surviving grandson of the Zamindár, had a vested right to it, and was entitled to the succession upon the death of the 1st defendant, according to Hindu Law and the customs which govern the succession to principalities or the said principality; that the 1st defendant had leased part of the zamindári to the 6th defendant, and the 6th defendant had assigned his interest to the 7th defendant; that the 1st defendant, notwithstanding her being a widow, had alienated, contrary to law, a greater part of the Pannai and Koalkriem lands of the zamindári, and pledged the State jewels and incurred debts likely to affect the permanent interests of the zamindári; that the 1st, 2nd, 3rd, 4th and 5th defendants and others had combined to defraud the plaintiff in respect of his right to the zamindári; that the 3rd, 4th and 5th defendants had executed an agreement to the 2nd defendant, their brother, assigning to him the interest in the zamindári which they pretended to have on the death of the 1st defendant; that the 1st defendant had also executed a document to one Ponnusámi Tévar, whose daughter had lately married the 2nd defendant, authorizing the said Tévar to establish the right which, the 1st defendant asserted, belonged to her son to succeed to the zamindári after her death, and to exercise other powers injuriously affecting the interests of the plaintiff and the zamindári. The plaintiff further alleged that he had demanded maintenance of the 1st defendant, but that she had refused to give it to him.

The 1st and 2nd defendants alleged in their written statement that the plaintiff had no right to maintenance and lodgings in the palace; that if he ever had any such right, his claim was barred by the Law of Limitations. That the present case was not one in which any declaratory decree as

to the plaintiff's supposed contingent rights could or ought to be made. That the plaintiff was not entitled to succeed to the zamindári on the 1st defendant's death. That the 2nd defendant alone was entitled to the zamindárí on the 1st defendant's death, and that the 1st defendant had not wasted or improperly alienated the zamindárí or any part thereof.

The 3rd, 4th and 5th defendants stated that the 1st defendant became entitled to and held the zamindárí under the decree of Her Majesty in Council; that the property was now the 1st defendant's, but not that of Gauri Vallaba Tévar. That the Hindu Law lays down that property vesting in an individual goes to his heirs to the exclusion of the heirs of the former owners. That the property so vested in and devolved on the 1st defendant should, according to Hindu Law, descend to her daughters, the 3rd, 4th and 5th defendants, and not to the plaintiff. That the plaintiff had no right to object to the agreement executed by the said 3rd, 4th, and 5th defendants, relinquishing their right in favor of the 2nd defendant.

The 6th defendant denied the plaintiff's right to succeed to the zamindári, and the 7th defendant was declared *ex-parte.*

Issues were settled as to plaintiffs right to succeed to the zamindárí at the death of the present Ráni, whether he was entitled to maintenance and apartments, and whether this was a suit in which a declaratory decree could be given.

The Civil Judge delivered the following judgment :—

"The principal object of this suit is the ultimate succession to the zamindárí of Shivaganga, the plaintiff claiming the reversionary right for himself as senior grandson of the Istimrár Zamindár, being the son of a daughter by his first wife ; and the 2nd defendant as the son of his only surviving daughter Kattama Náchiár, to whom the zamindárí was adjudged by decree of the Privy Council on the 30th November 1863.

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For the defendants it is contended that this is not a suit in which a declaratory decree can be given at all; I shall, therefore, proceed to consider the last issue first, for if this is a matter in which a decree declaratory of title cannot be pronounced, the contention between the parties, except in regard to Dorasinga Tévar's claim for maintenance, is at an end.

The words of the 15th Section of the Procedure Code, under which the suit is brought, are as follows :—"No suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the Civil Courts to make binding declarations of right without granting consequential relief." Now the words of this Section are almost precisely those of Section 50 in the Chancery Amendment Act (15 & 16 Vic. c. 86) and, were it not that this kind of relief is frequently refused at home, I should have thought that little doubt could have existed as to their plain meaning.

With regard to their application, some Judges in the High Court in Bengal appear to have considered that it was entirely in the discretion of the Court to grant relief under this Section, or to withhold it; and that each case must be judged by its own particular circumstances: others that some injury must appear so probable, as to lead to the conclusion that, unless stayed by the declaratory decree, the inchoate or threatened injury may be completely perpetrated (5 *Wyman*, 242). In Madras in *Special Appeal No.* 62 *of* 1862 (1. M. H. C. R. 206), in a suit brought by A and B against D and E regarding the estate of their relative C, a decree declaratory of A and B's reversionary right after D's death was upheld; but in this case an act had been committed hostile to the plaintiff; that is, the property in dispute had been transferred by the 1st to the 2nd defendant. In *Special Appeal No.* 288 *of* 1863 (Volume II, page 171) where a plaintiff had failed to establish his title affirmatively, it was held that he was not entitled to a decree declaratory of his title as owner; and so also in *Special Appeal No.* 1 *of* 1865 (page 333 ib.) it was ruled that when a party is in possession of all his alleged rights, he is not in a position to bring an action.

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I think, however, the leading case is *Special Appeal No.* 22 *of* 1865, (page 378 ib.) in which the Court, adverting to the difference in procedure which obtains at home, and which admits of bills for the perpetuation of testimony, were of opinion that it did not follow that in every case, in which the Section was held to be inapplicable by the Courts of Chancery, it was necessarily inapplicable here; and, accordingly, the Court confirmed the decree declaratory of plaintiff's reversionary right, in order to save him from the risk he might be exposed to of losing evidence of his title altogether ; still the decree carried with it a partial remedy, for the defendant had alienated the property in which plaintiff had the right in reversion. A more recent case and the nearest to the present one is *Special Appeal No.* 83 *of* 1869 from Tanjore (unreported), which was decided subsequent to the hearing in this suit. Here all that was sought for and obtained, was a decree declaratory of plaintiff's reversionary title as a daughter's son in preference to that of a daughter's daughter. No positive act of hostility seems to have been committed by the defendant, further than that she was anxious to acknowledge her daughter as the rightful reversioner.

For the defendants, it is contended by the Advocate General that there is no danger of Dorasinga Tévar being unable at any time to prove himself the eldest surviving grandson of the Istimràr Zamindár, as this is apparent from the blue book in the great *Shivaganga case* ; and by Mr. Mayne, that, when the object is to establish a speculative interest in property, or to have a point of law cleared up, no action is maintainable. On the other band, the counsel for plaintiff maintain the contrary, alleging that Dorasinga Tévar's right to succeed is, as in point of fact it is, resisted by the mother of the 2nd defendant ; and that, even now, she has appointed an agent, under a deed admitted and filed in the suit, to uphold her sons's subsequent right to the inheritance. Certain alienations were also assigned in the original plaint as constituting a ground of action ; but the Court, by its Proceedings of the 22nd April, ordered them to be struck out of the record.

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Giving due weight to the arguments advanced on both sides, I think there is sufficient authority for proceeding with the suit; for if the point of law raised as to the right to succeed to this zamindárí be not cleared up during the life-time of the present incumbent, plaintiff will be subjected, if alive, to the inconvenience of having to come to Court again at her decease; and if he has the right which he asserts he has, of having of necessity to wait out of possession till the question is finally determined. I am, therefore, of opinion that this is a case in which the Court is empowered to grant a declaratory decree, and accordingly I decide the 7th issue against the defendants.

Upon the merits, the argument on behalf of plaintiff is briefly this:—that women, whether widows or daughters, when they inherit, take but a life-estate; and that when, therefore, the line of daughters is exhausted, the property goes to him who is in the position of next heir to the propositus; and plaintiff in this suit is set up as that heir.

On the other hand, the counsel for the defendants contend that the zamindárí having devolved upon Kattama Náchiár as sole surviving daughter of the Istimrár Zamindár in succession to Angamuttu Náchiár, the last surviving widow, and plaintiff's mother Vella Náchiár having predeceased Angamuttu, the inheritance never vested in Vella Náchiár, and that, consequently, she can transmit no right in it to her descendants. They further advance another and most ingenious theory, namely, that when property has devolved upon a daughter having male issue, such male issue have, from the time of their birth, an inchoate right to the same; and that, in virtue of this proposition, the succession devolves on 2nd defendant, to the exclusion of the plaintiff, as coheir of his mother the 1st defendant.

They thus contend—in opposition to the generally received opinion that daughters take as a class in common—that the doctrine of survivorship is applicable only when the female, to whom the property has descended, is destitute of male issue; that having once vested in a daughter who has male issue, it becomes vested in that issue also; and that

thus, by the operation of the law, even other daughters are cut out of the inheritance. Whether or not there is any foundation for this proposition in Hindu Law, will be seen when the authorities are reviewed and commented upon; but it is clear, that if the line of descent is as contended for by the learned counsel who appeared for the defendants, a fatal blow has been struck to the claim advanced by the plaintiff.

The chief question, therefore, that has now to be decided is the nature of the estate which a daughter takes in immoveable property which has devolved upon her by inherittance from her father.

I will pass over that portion of Mr. Gould's argument which refers to the intimate relation which exists between the law and the religion of the Hindus, and the efficacy which attaches to the offering of funeral oblations to the manes of deceased ancestors; for though, no doubt, they are blended together to a considerable degree, it is incontestable that the maxim of law is that the person who is entitled to succeed to the property of the deceased, is also bound by religious duty to perform his funeral obsequies; and, consequently, any pretensions, founded upon the mere fact of having celebrated them, can only be construed as giving a claim to the succession, when put forward by the person who is legally the most competent to offer them. Hence, it becomes unnecessary to consider further either the plaintiff's allegation or the evidence adduced by the defendants to disprove it, that he has been performing the usual ceremonies in honor of his deceased grandfather.

Illustrations have further been given to show that the natural state of a woman under the Hindu system is one of dependence; that being incompetent to offer the funeral oblation, they are, by virtue of their sex, incompetent to inherit, except in those instances expressly provided for; and from this it is inferred, that, when females do succeed to property, the law confers upon them nothing but a life-interest in it; or, in other words, that they hold as trustees for the ulterior heirs. That this is clear law in respect of the widow, mother, and grandmother is conceded by the counsel on the opposite

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side, but they deny that the same reasoning is applicable in the case of a daughter, whom they contend the law has placed upon a different footing.

I will, therefore, now turn to the authorities which govern this question, and in doing so, I shall have to quote from the *Mitákshará*, the *Smriti Chandrika* and the *Mádhavíya*, works of acknowledged authority in Southern India; the *Dáya-kráma-Sangraha* and its kindred treatise, the *Dáyabhága* of Jímúta Váhana, which carry most weight in Bengal; and lastly from the *Saraswatí Vilása*, a work said to be an authority in Southern India, though supplanted in some measure by the *Mitákshará.*

The passage in the *Mitákshará* is to be found in Chapter II, Section II, (page 440, Stokes's edition) on the right of the daughters and daughter's son. In para. 1 it is declared that on failure of her (*i. e.* the widow) the daughters inherit, and, in para. 2, the author supports his dictum by quoting the text of Katyáyana,—"Let the widow succeed to her husband's wealth provided she be chaste, and in default of her let the daughters inherit if unmarried;" and also that of Brihaspati "The wife is pronounced successor to the wealth of her husband; and, in her default, the daughter. As a son so does the daughter of a man proceed from his several limbs. How then should any other person take her father's wealth?" Then in paras. 3 and 4 the order of succession in the event of there being competition is explained; thus the unmarried, it is declared, take first; then the married, preference being given to the one unprovided for over the enriched daughter. In failure of daughters, the daughter's son is placed next in the order of succession, according to the texts of Vishnu and Manu given in the 6th para.—"If a man leave neither son, nor son's son, nor issue (*i. e.* female issue and implying wife also), the daughter's son shall take his wealth. For in regard to the obsequies of ancestors, daughter's sons are considered as son's sons;" and "By that male child whom a daughter, whether formally appointed or not, shall produce from a husband of equal class, the maternal grandfather becomes the grand-sire of a son's son. Let that son give the funeral oblation and possess the inheritance."

Those portions of the *Smriti Chandrika* and the *Mádhavíya* which bear on the subject are to be found in Chapter XI, Section II, and in paras. 36, 37 and 38, page 26, respectively; and the authors, citing with approbation the texts of Brihaspati, Vishnu, Manu, Katyáyana, Nárada, and Gautama, arrive at precisely the same conclusions; the author of the *Smriti Chandrika* adding in accordance with the doctrine of Dikshita, as explained by Jimúta Váhana, that barren daughters and the like are excluded from the inheritance on the ground of their being incapable of conferring upon their deceased father spiritual benefits.

The author of the *Dáyakráma Sangraha* is somewhat more explicit. In Section 3, Chapter I, page 476, he declares that in default of the wife the daughter next succeeds, in conformity with the following text of Dévala—"His own maiden daughter, born in holy wedlock, shall like a son take the inheritance of him who dies without male issue," and also with that of Parásara, "Let a maiden daughter take the heritage of one who dies leaving no male issue, or if there be no such daughter, a married one shall inherit." In para. 3, the author brings to notice a special rule which he says must be observed, namely, that if a maiden daughter in whom the succession had once vested, and who was subsequently married, should die without having borne issue, the married sister who has and the sister who is likely to have male issue, inherit together the estate which had so vested in her; and that it does not descend to her heirs like her stridhana; and so also, in the event of there being no maiden daughter, it is declared in the next para. that the inheritance vests in the married daughters together as aforesaid, with the proviso that on failure of either of them the other takes the heritage, on the ground that daughters of each description (*i. e.* appointed or not appointed) confer benefits on the deceased owner by presenting to him through their sons, funeral oblations at solemn obsequies. The 4th Section treats of the right of the daughter's son, which in unison with all the other authorities is declared to be next after all the daughters, implying all those that are entitled to the succession.

Jímúta Váhana goes further and supplies a reason why property should not vest in the first instance solely in a

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daughter who has male issue, to the exclusion of the maiden daughter. In Chapter XI, Section 2, para. 11, page 325 of the *Dáyabhága*, after describing the torments which await parents who fail in giving their daughter in marriage while yet young, he says " It must not be alleged that, admitting this doctrine (*i. e.*, benefits conferred being the cause of a right of succession), the daughter who has male issue should alone inherit in the first instance, but on failure of such then a daughter who may have issue. For her son, born subsequently, might in this manner be excluded from the succession. Nor is this proper; for both equally confer benefits on their grandfather as daughter's sons." And no reason is given why this argument should not apply equally, where in default of the maiden daughter, the married take the inheritance. Then with regard to the ultimate succession, the same author, in that portion of the work which treats of the widow and the limited power which she has over her husband's estate declares (para. 65, page 322)—"In like manner if the succession have devolved upon a daughter, those persons who would have been heirs of her father's property in her default, take the succession on her death; not the heirs of the daughter's property"—thus making a clear distinction between the devolution of what might constitute her stridhana and that which descended to her in the course of inheritance. The same rule which he maintains is general in the case of a woman's succession appears further on in para. 3, page 330—" Since it has been shown by a text before cited (Section I, para. 56), that, on the decease of the widow in whom the succession had vested, the legal heirs of the former, who would regularly inherit his property if there were no widow in whom the succession vested, namely, the daughters and the rest, succeed to the wealth; therefore the same rule is inferred *à fortiori*, in the case of the daughters and grandson whose pretensions are inferior to the wives." This text, which has the strongest bearing on the question at issue before the Court, is spoken of by Jagannatha (p. 547, Vol. 11, *Digest*), as an opinion of Jímúta Váhana respected by many Lawyers, though not directly supported by the text of any legislator or concurrence of any commentator; and in allusion to the widow he throws out a hint, that, nevertheless,

it is not equally certain that a daughter's right of enjoyment is of the same restricted nature. Strange, also Elberling and the elder Macnaghten have delivered their opinions on the strength of this authority, and, as far as my researches go, I have not seen anything directly controverting it.

So far, therefore, it seems to me the authorities do not countenance the proposition set up on behalf of the 2nd defendant; but the Advocate General has drawn my attention to and laid great stress upon, the following passage from the *Saraswatí Vilása* (a translation of which was laid before the Court by Mr. Strínivásachâriar and which I leave with the record in case of appeal to the High Court),—" Property inherited by a daughter, though itself of the nature of obstructed heritage, shall become an unobstructed one, if there are daughter's sons at the very moment it has passed to daughters, because the conjunction 'cha' which is used to signify things not specifically mentioned and the particle 'eva' remind us of the right of the daughter's son to the property at the very moment it is vested in the daughter." Being ignorant of Sanscrit, I am unable to follow up the author's argument, further than the passages of which I have the translation, but the text, taken by itself, is certainly one of equivocal import. It may or it may not apply to the Advocate General's theory, but to my understanding it is no more than a general mention of the fact itself; for the heritage would be designated as an obstructed one were there no daughter's son then in existence. Strange, in page 131 of the last edition, thus distinguishes between obstructed and unobstructed heritage,—" The heritable pretension of the son of a Hindu being immediate, is 'a heritage not liable to obstruction;' answering with us to the heir apparent, whose right, if he outlive his ancestor, is indefeasible; while that of remoter heirs, as of brothers, uncles and others, is distinguished as being 'liable to obstruction' by the intervening birth of nearer ones, so that their title is not apparent but presumptive only." It follows, therefore, that the text quoted is not an authority for the proposition, that a son has necessarily an inchoate right to the property devolving on his mother; but rather that the other heirs expectant whoever they may be, are cut out of the inheritance by reason

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of that son having sprung into being; and the effect upon them in this particular instance is the same, whether caused by the existence of Dorasinga Tévar or the 2nd defendant. Indeed the author's summing-up points to no more than this, for he says: "Hence the inheritance by a daughter's son is unobstructed, but not by a daughter." He then forms the following conclusions.—"As the property vested in a daughter does simultaneously pass to the daughter's son, if she has a son, the inheritance inclines to him; and it is only when the daughter's son does not exist, it will not pass to his son, but reverts to parents." The whole force of this passage (which is really no more than declaratory of the daughter's son's ultimate right to the succession), as supporting the case for 2nd defendant, rests on the word simultaneously. Whether or not it is a right translation, I do not know. I hardly think it can be, for it is not required to establish the connection between the two passages; indeed it is rather opposed to the author's concluding dictum, for if the ownership does, as is pressed upon the Court, pass *simultaneously* to a daughter's son, it is not easy to see why, on the principle of representation which obtains among sons and son's sons, in her default his (that is the daughter's son's) son should be excluded from the succession, on the ground, as other text writers put it, of his being too remotely connected with the original owner to offer up the funeral oblation. It must, therefore, be admitted that the novel and ingenious theory which has been propounded by the Advocate General rests upon a very narrow basis of authority, if indeed it has any foundation at all in Hindu Law.

It would prolong this judgment to a degree that would be tedious if I were to refer to all the modern authorities cited on both sides, and therefore I will confine myself to a few and the most important. Some were alluded to for the purpose of analogy; of this class is the recent case of *Bhugwandeen Doobey* v. *Myna Baee* (11 Moo. I. A. 487), and the point of law that was determined is this that when more widows than one succeed by inheritance to the property of their husband, they take a joint estate as co-parceners with a right of survivorship; their Lordships in

the judgment expressing an opinion strongly in condemnation of that passage in the *Mitákshará* alluded to by Strange, which classes as stridhana even the property acquired by a woman by inheritance. The case also of *Bachiráju* v. *Venkatappadu* (2 M. H. C. R. 402) supports this view, and it decides that a mother inheriting from her son does not take an absolute estate but has only a life-interest in the property; and that it goes at her death to the next heir of the propositus. In Bengal, also, the law in this respect is identical with that current here, for the same point was determined in a similar manner in the case of *Nufur Mitur and others* (4 Ben. S. D. R. 310).

Other cases were considered more pertinent, for instance that of *Hurrydoss Dutt* v. *Streemutty Uppurnah Dossee* (6 Moo. I. A. 433); but here, though the arguments at the bar extended to the very question which is now before the Court, no decision was pronounced upon it. In the judgment, however, there is much to lead me to suppose that their Lordship's views would not have run contrary to what is now contended for by the Counsel for the plaintiff, for, at page 445, the following passage occurs,—" Now, the bill alleges that, in this respect, (that is in respect of their right over the subject-matter of the property in dispute), the widow and the daughter stand in the same situation. Whether they stand in the same situation or not with respect to the right of disposition of the property, they at all events stand in the same situation as to the right of administration and right of enjoyment for their lives," but no case of devastavit having been made out by the party who claimed to be the reversioner, the appeal was dismissed and the judgment of the Court below affirmed. Another case, the decision of which is coincident with the proposition advanced on behalf of the plaintiff, is that of *Mussummat Gayan Kuwur and others* (4 Ben. S. D. 330) where it was held, that, according to the law as current in Mithila and the west, a daughter has no power to alienate her ancestral property to the detriment of other heirs; and the next in succession were declared to be the nearest heirs of her father then living. It is true that this is not an authority

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in the Madras Presidency, but the case may be usefully referred to by way of illustration.

The Counsel for the defendants rely principally on the following: *Vinayek Anundrao* v. *Luxmibayi* (1 Bom. H. C. R. 117) and what is known there as *Dewcooverbaee's case* reported at page 130 of the same Volume. I have considered both the judgments in these cases, and though I observe that on that side it is held that daughters taking by inheritance take the estate absolutely, yet I do not find anything else in favor of the theory set up by the Advocate General, nor on the other hand anything hostile to that relied upon for the plaintiff. In the former case, which was confirmed by the Privy Council (9 Moo. I. A. 516), the effect of the decision is that in Bombay sisters, on the authority of the *Mayukha,* are treated as heirs of their brother rather than his paternal relatives, such as the sons of his father's separated brother, and in the latter that when a separated Hindu died without male issue, his widow took his moveable property absolutely and the immoveable for life; and at her death the daughter took absolutely in preference to the brother and the issue of a deceased brother.—*Navalram Atmaram* v. *Nandkishor* (1 Bom. H. C. R. 209) was also cited, but the decision is in direct conflict with what was found to be law on this side in *Sengamalathammal* v. *Valayuda Mudali* (3 M. H. C. R. 312,) and it cannot, therefore, be held up as an authority. It classes, on the authority of the *Mitáksharâ,* all property inherited by a married woman from her father as stridhana; and, of course, if this was the law which obtained in the Madras Presidency, the Shivaganga Zamindári would descend to the 2nd defendant. In the face, however, of the observations which fell from their Lordships in *Myna Baee's case* (11 Moo. I. A. 512) there are grave reasons for doubting if this decision would have held good, had the case been carried on appeal before the Privy Council.

With regard then to the nature of the estate which a daughter takes, there is, I admit, a conflict of opinion, springing perhaps, in some measure, from the confusion which arises in trying to fix upon Hindu tenures corresponding English technical terms, and this has, no doubt, led to what was felt

at the bar to be an erroneous decision in the case of *Jamyatram* v. *Bai Jamna* (2 Bom. H. C. R. 10). Notwithstanding this it does not follow that basing the assumption on the text of Manu,—"The son of a man is even as himself and the daughter is equal to the son," and admitting the doctrine of representation in the case of the latter, that sons and daughters are, in respect of the transmission of inheritance, on terms of perfect equality, although it may be (from the influence which the spiritual doctrine of benefits rendered has over the temporal affairs of the Hindus, the whole Hindu Law being based on such) that in respect to such spiritual benefits their sons (*i. e.* son's sons and daughter's sons) stand in the same analogous situation. On the contrary, the fact that they take in the first instance on different principles; that daughter's grandsons and daughter's daughters are excluded from the succession; and that daughter's sons when they do succeed take per capita, as has been affirmed by Jagannátha and decided in *Ramdhaunsein and others* v. *Kishenkuthsein and others* (3 B. S. D. p. 100) constitute a very essential difference.

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It is quite intelligible therefore, that, while the spirit of the Hindu Law may not wish to place the same restrictions over the married daughter's power of dealing with the corpus of her father's property as it has placed upon the widow's, though I do not express an opinion that it is not so, yet it may wish to provide that the succession at her death should not devolve upon her heirs, as is the case in regard to her stridhana, but upon the person who may be the next according to the order of degree in relationship to her father. That this is the law which regulates the course of inheritance may be legitimately inferred from the authorities current in the Madras Presidency, while (with the exception perhaps of the maiden daughter who subsequently marries and has male issue) it is expressly declared to be so in Bengal; and surely it rests on those who assert a different principle, when the succession has vested in a married daughter having male issue, to establish that exception to the generality of the rule.

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Whether or not the inheritance ever vested in Vella Náchiár does not appear to me to be of any material consequence, for plaintiff's rights, if he has any, though traceable through her, are derivable from his grandfather; and if, as declared by Bríhaspati, a daughter is heir of her father's wealth in right of the funeral oblation which is to be presented by the daughter's son, and if the devolution of property upon persons who are said to be heirs, rests upon the spiritual benefits to be performed by those heirs, it is difficult to see why 2nd defendant should be preferred to the plaintiff. Both minister, in an equal degree, to the peace of their departed ancestor, and if the property could be divided they would share it equally. It is not contended that the rule of succession is other than that of the general Hindu Law which obtains in Southern India; and as, therefore, the property is capable of enjoyment by only one member of the family at a time, it follows that the succession to it must be regulated according to the law of primogeniture which is also in this case in accordance with natural justice. In this view of the law, therefore, and following the *Urkád case* (3 M. H. C. R. 75), I decide upon the first issue, that at the death of the present Ráni, as between the plaintiff and 2nd defendant, the plaintiff as the eldest of the grandsons has the preferable right to succeed to this zamindárí.

The 2nd, 3rd, and 6th issues have been abandoned, and it only remains now to be considered whether Dorasinga Tévar is entitled to any maintenance. The defendants contend that his claim is barred by the Act of Limitation; but I think not, as Kattama Náchíar did not enter into possession till 1864, and the evidence shows that while the zamindárí was in the hands of the usurpers a small monthly allowance was being paid over to him. It is true this act of theirs is not binding on the Ráni, but it is manifestly unjust, if the time commenced to run against him according to the words of the 13th clause, Section I of the Limitation Act, from 1850, the date of the death of Angamuttu, not to admit this in the computation. I think, therefore, the time must be held to have commenced, either from the date of Kattama's accession, or from the date of last payment, which in neither case has exceeded 12 years. Nevertheless it does not appear to me that

he is entitled to anything under Hindu Law. Strange lays down that the principle is that whoever takes the estate of the deceased, must maintain those whom he was bound to support, and the question arises would the Istimrár Zamindár if he were living, or his son if he had had one, be bound to maintain Dorasinga Tévar? Morally perhaps, if he were starving, but I think not legally, for his mother as a married daughter must be considered as provided for, and there is some little evidence to show that a provision was made for her during her life-time and that plaintiff has his father's estate to live upon. The cases referred to are not in point, and Mr. O'Sullivan admits that there is no authority which expressly provides for a case similar to this one. I am, therefore, of opinion that, though plaintiff is declared to be the next in succession, he has no legal claim to be maintained now out of this inheritance.

My decree therefore is, that as between plaintiff and 2nd defendant, plaintiff be declared the next in succession to the Shivaganga zamindárí; that plaintiff's claim to maintenance and apartments be dismissed, and that he pay so much of his own costs as may be found due thereon, as well as those of the 6th and 7th defendants. The 1st defendant will bear the remainder."

The 1st, 2nd, 3rd, 4th and 5th defendants appealed to the High Court on the following grounds:—

1. Because the case was one in which no declaratory decree could be pronounced.

2. Because the declaration that the plaintiff is entitled to succeed to the Shivaganga Zamindárí on the death of 1st defendant, is contrary to Hindu Law and ought to be reversed and set aside.

3. Because the declaration ought to have been in favor of the 2nd defendant's right to succeed to the said Zamindárí on the death of the 1st defendant.

4. Or, if no declaration ought to have been pronounced in favor of the 2nd appellant, the 1st, 3rd, 4th and 5th appellants submit that a declaratory decree, if any, ought to have

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been pronounced in favor of the 3rd, 4th and 5th appellants, because the property is stridhanam in the hands of the 1st appellant, and, as such, devolves at her death on the 3rd, 4th and 5th appellants, her daughters, to the exclusion of the respondent.

The *Advocate General*, *Mayne* and *Karunákara Menon*, for the appellants, the 1st to 5th defendants.

Gould, *O'Sullivan* and *Ráma Rau*, for the respondent, the plaintiff.

The Court delivered the following judgments,—

SCOTLAND, C. J.—This is an appeal by the 1st, 2nd, 3rd, 4th and 5th defendants from the decree of the Civil Court of Madura declaring the plaintiff Dorasinga Tévar to be, preferably to the 2nd defendant, the reversionary heir to the zamindárí of Shivaganga with its appurtenances on the death of the 1st defendant the present Zamindární, but dismissing his claim to an annual allowance for maintenance and to the use of apartments in the zamindárí Palace, and adjudging the 1st defendant to pay the plaintiff's costs, except so much of the amount as was apportionable to his unsuccessful claim.

The grounds of appeal relied upon are—That the plaintiff could not maintain the suit for a declaration of his right to be the next successor. But if the suit was maintainable, the decree ought to have declared either that the 1st defendant's son (2nd defendant) had the preferable right, or that the zamindárí was stridhanam property of the 1st defendant, and that her daughters (3rd, 4th and 5th defendants), therefore, were her rightful successors.

There is happily no dispute as to the important facts of the case. Dorasinga Tévar, the plaintiff, is the eldest surviving son of Vella Náchiár the only daughter of the Istimrár Zamindár by his senior wife. The 1st defendant, the Zamindární, is the youngest of his two daughters by his 3rd wife. He had also a daughter by his 2nd wife and another by his 6th wife. When the 1st defendant obtained possession of the zamindárí under the order of Her Majesty in Council establishing the right of the daughters of the Istimrár Za-

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mindár to succeed to the zamindárí on the death of his surviving widow Angamuttu Náchiár, but without prejudice to the rights of the 1st defendant and her sisters *inter se*, she was the only survivor of the Istimrár Zamindár's five daughters. The plaintiff's mother and the daughter by the 6th wife predeceased Angamuttu, and the daughter by the 2nd wife and the 1st defendant's uterine sister survived Angamuttu, the former twelve years and the latter two years. Beside the plaintiff's mother the 1st defendant's uterine sister was the only one of the deceased daughters who had issue, and her only child (a son) died issueless some years before the 1st defendant had established her right to the zamindárí. Before Angamuttu's death the 1st defendant was twice married, and it is admitted on both sides that the marriages were proper by the custom of the Maravar caste, to which the family belong, and were both valid. The 3rd defendant is the only child by her first husband, and the 2nd, 4th and 5th defendants are her sons and daughters by her 2nd husband. Both her husbands are dead.

I am of opinion that the first ground of objection cannot be supported. It has been decided by this Court that the rule of the Equity Courts in England is not applicable to declaratory suits here, and it is now settled that a suit praying nothing more than a declaration of title is maintainable under the 15th Section of the Code of Civil Procedure, although no consequential relief be grantable upon the declaration, if a good ground for seeking the protection of such a suit is shown to exist. There have been several decisions on the point, that in the case of *Karyan* v. *Doddali and others*,[(a)] decided on the 4th of August last, being the most recent; and their combined effect, I think, is to establish that a suit for a declaration of title without any consequential relief will not lie upon the mere ground of denial or slander of a person's title, or the apprehension of a hostile claim at some future time. To support such a suit there must appear to have been some act done which had worked, or was likely to cause injury, or serious prejudice to the plaintiff's alleged title; and in the present case I think that ground does appear. It appears that the 1st defend-

(a) See p. 307 of this Volume.

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ant, favouring the 2nd defendant's title, and concerting with him in opposition to the plaintiff, had employed an agent and executed a Power of Attorney to him for the purpose of assisting the 2nd defendant to possess himself of the zamindárí and withhold possession after her death. This, without reference to the other acts alleged, is sufficient to show an extreme determination of hostility towards the plaintiff; and there can be no doubt, I think, that serious injury to the plaintiff's right is the probable, if not certain result of the opposition thus begun. The plaintiff therefore had, in my opinion, a right to institute the suit.

Then as to the substantial objection to the declaration made by the decree: the first question to be considered is whether, when paternal property descends to the survivors or survivor of several daughters, the sons of all the daughters, or only the son or sons of the daughter or daughters in whom the property vested, are or is entitled to succeed as the heir or heirs of their grandfather. If all the sons are entitled it is not a defect in the plaintiff's claim that his mother pre-deceased Angamuttu, and the plaintiff has been rightly declared to be the next heir to the zamindárí in preference to the 2nd defendant, the succession being governed by the law of primogeniture. On this question the learned Counsel for the appellants, taking the rule of law to be that daughters who succeed as a class to paternal property take a joint-estate with benefit of survivorship, and that on the death of the last survivor their sons take *per capita* as next heirs of their grandfather, have argued that the reason of the rule is the capability of daughters to procreate sons, who, being equal to son's sons as offerers of the most effectual funeral oblations to the spirit of their deceased grandfather, are through their mothers his immediate male heirs; that the succession under the rule must be understood to pass from and through the daughters or survivor of the daughters in whom the property actually vested to their or her son or sons, to the exclusion of the sons of other daughters, and that the 2nd defendant therefore was the next successor. The learned Counsel on the other side affirming that daughters, like widows and a mother, succeed by positive law to only a life interest in

paternal property, contended that the hereditary right to it passes not through the daughters, but directly from their father to his grandson or grandsons, or, in default of a grandson, to his next sapinda, subject to the daughter's life interest, and that, therefore, the plaintiff, as the eldest grandson, was the heir entitled to succeed on the death of the 1st defendant.

There is no doubt, I apprehend, that as to the estate which daughters take by succession when there is a son to inherit, the view of the law presented by the positions advanced on both sides is correct. It appears to me also that the law is the same when there is no grandson, as put on behalf of the respondents, but that is not a point which it is necessary to consider. I think it clear, too, that as respects the reason upon which the law rests, the argument on behalf of the appellants is supported by the weight of the authoritative texts and commentaries of the Benares and Bengal Schools; although the schools differ, perhaps, as to the extension of the reason to the exclusion of barren and sonless widows. See *Smriti Chandrica* (Krishnasawmy's translation) Chap. 11, Sec. 2, Sl. 10; *Dáya Kráma Sangraha*, Chap. 1, Sec. 3; *Dáyabhága*, Chap. 11, Sec. 2; 1 *Stra: H. L.* 138. In Chap. 2, Sec. 2 of the *Mitákshará*, which treats of the right of daughters to inherit, this reason is not explicitly declared, but it is, I think, implied, and nothing found in Sec. 1 of the same Chapter, in which the applicability of the like reason to the right of widows to succeed is controverted, seems to me to go beyond refuting the generality of the reason. Since, at all events, the far distant time when the reprobated and obsolete practice of appointing another to beget issue on the widow existed, her right of succession appears to have rested upon her own competency to make sacrificial offerings to her husband's spirit, which are declared to be only less efficacious than that of sons.

Consistently with this reason the same authorities establish, I think, that when the sons of daughters succeed to the property of their grandfather they take by direct right of succession as being his nearest heirs, like the sapindas of a man succeeding to his property on the death of his widow but *per capita*. The rule of succession exists as laid down in

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the *Dáyabhága*, "à fortiori in the case of the daughter and "grandson whose pretensions are inferior to the wife's" (See also the *Mádhavíya Commentary* by Mr. Burnell, p. 26): and it rests upon the great principle of the entire Hindu Law of succession to property, that nearness in regard to the attributed capacity and sacred duty to confer spiritual benefits by the offering of funeral oblations either immediately or mediately, confers the right to inherit temporal wealth. Now it is beyond question that all sons of daughters are accounted to possess the virtue to confer such benefits with like efficacy. The general ordinance declared is that "in "regard to the obsequies of ancestors daughter's sons are "considered as son's sons." *Mitákshará*, Chap. 2, Sec. 3, Sl. 6; *Smriti Chandrica*, Chap. 11, Sec. 2. Sl. 10; the *Mádhavíya Commentary*, Sl. 37. In principle then the law does not admit of the succession of some of the sons of daughters to the exclusion of the others, and I do not find anything expressed in the texts or commentaries of the school of law which prevails in Madras giving support to the contention of the learned Counsel for the appellants on this point.

The rule laid down in the *Dáyabhága*, Chap. 11, Sec. 2, Sl. 30, and the *Dáya Kráma Sangraha*, Chap. 1, Sec. 3, Sl. 3, that married sisters succeed after the paternal property had vested in a maiden daughter, only on her death without issue, appears to be the single rule which favors the exclusive succession of the sons of a daughter in whom the paternal property actually vests. Mr. Macnaghten, in his "*Principles of Hindu Law*," states as a settled distinction between succession of maiden and married daughters according to the law of Bengal, that if the former marry and die leaving sons and sisters or sister's sons, her sons alone take to the exclusion of the sisters and their sons. But he adds "this distinction does not seem to prevail any where but in Bengal." At present I have a strong impression that the Hindu Law governing here does not recognize such a distinction, but assuming the law to be the same, I do not see that the case of the appellants would be aided even if the vesting of the property in the surviving daughters be taken to have relation back to the death of Angamuttu, for before that event the 1st defendant had been twice married.

Some stress was laid by Mr. Mayne on translated passages from the *Saraswati Vilása*, a treatise described as similar to the *Smriti Chandrica*, and of some authority in Madras, as upholding the position that sons of a daughter succeeding to the possession of paternal property are in a better position as heirs than the sons of her sister. The passages are fully set out in the judgment of the Civil Judge, and they do not appear to me to have a bearing in that way. They refer to the subject of obstructed and unobstructed heritage, and point out generally that the descent of paternal property to daughters is one of the instances in which obstructed heritage takes place, but it becomes unobstructed instantly on the descent if there are daughters' sons, because of the sons' rights as heirs of their grandfather attaching at the very moment of the vesting of the property. In effect, as it seems to me, that the heritage is unobstructed when there is male issue of any daughter, because the rights of such issue as heirs exist simultaneously with the interest of the daughters. There is no allusion to a preferential right of the sons of any one daughter, and nothing expressed is inconsistent with the sons of several daughters sharing the inheritance.

For these reasons I am of opinion, that unmarried or married daughters, on whom as a class paternal property devolves, take a joint-life interest with rights of survivorship,—that the estate of inheritance passes from their father to the sons of all the daughters as his nearest heirs ; and that, on the death of the last surviving daughters, the sons take the property equally ; and consequently, that the plaintiff, being the eldest surviving grandson of the Istimrár Zamindár, is the heir, having the right to succeed to the property in dispute on the death of the Zamindárni, the 1st defendant.

With respect to the 2nd question raised by the appellants' objection to the declaration of the plaintiff's right, whether the zamindári is the stridhanam property of the 1st defendant, I need not add anything, as my conclusion on the first question is obviously decisive of it. But I ought perhaps to say with reference to the arguments (contradictory to those on the first question) advanced on behalf of the ap-

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pellants, that the authorities do not, I think, present any ground for them. There are some texts and comments recognizing as stridhanam paternal property devolving on a daughter, but they appear to me to relate only to an *appointed* daughter who was declared to become by the appointment the third description of son.—*Mitákshará*, Chap. 1, Sec. 11, Sl. 13 and Chap. 2, Sec. 2, Sl. 5. *Dáyabhága*, Chap. 11, Sec. 2, Sl. 10, 16—and they are of no force now, the appointment of a daughter, like that of a widow, having become obsolete as to other daughters.

I can find no recognition of a similar kind, and it is expressly declared in the same section of the *Dáyabhága*, Sl. 30, and in the *Dáya Kráma Sangraha*, Chap. 1, Sec. 3, that paternal property does not become their stridhanam, and in the passages cited from the *Vilása Mitrodáya* the contrary position is refuted.

The comments in the *Mitákshará*, Chap. 2, Sec. 2, and the *Mádhavíya*, Sl. 34, on the text of Gautama declaring a woman's peculiar property to belong to her daughters, to the effect that it is equally applicable to paternal property, import, I think, merely that such property devolves on daughters.

The fundamental principle of the law of succession, too, is adverse to the contention of the appellants, for if paternal property passing to a daughter were to become her stridhanam the succession would pass away from those who were the nearest heirs by virtue of their capacity to offer oblations to the last male owner.

On these grounds I am of opinion that the decree of the Civil Court is right and should be affirmed, but without costs.

HOLLOWAY, J.—There are three points raised by the appeal.

1. Was this a case for a declaratory decree ?

2. Will an estate which has passed to a daughter descend to her children to the complete exclusion of the children of another daughter who was dead at the grandfather's death, but who if alive would have succeeded ?

3. Is the question to be decided in favor of the appellant, because the property has descended to a woman and is thereby stridhanam?

When once the doctrine of the English Courts as to declaratory decrees is abandoned, I can scarcely conceive a case more fit for one than the present. The title is likely to become obscured by lapse of time, the point of law is a doubtful one, there was no admission of the pedigree until the case was about to be tried.

It certainly seems to me that the quieting of doubtful titles is a better reason for such a suit than the fact of alienations having been made.

The peril from the disappearance of testimony in these cases is that of the defendant, not of the plaintiff and reversioner. Many suits much more objectionable than this have been permitted, and I see no reason to doubt that this should be.

On the second question I shall not unnecessarily repeat the authorities embodied in the elaborate judgment of the Civil Judge, but shall content myself with stating what I consider to be the effect of those quoted by him and those addressed to us in this argument. The propositions asserted on the side of the appellant are:—The right of daughters to succeed at all is in consequence of the anticipated merit of the production of sons. Where several take as a class they take jointly with benefit of survivorship. Where the whole vests in one to the exclusion of the others in anticipation of getting a son and that son is got, the whole vests in that son to the exclusion of the sons of the other daughters, and—applying the proposition to the present case—the plaintiff's mother was dead and it vested in the mother of defendant; the death of the present holder will not let in the plaintiff.

The proposition asserted on the other side was:—In the Hindu law females occupy a dependent position, they never inherit except in particular circumstances, and take only a life-estate; the right of succession is, therefore, not to be traced from them but from the grandfather, and the question

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always is who would have been his heir if no daughter had interposed. The application was—if no daughter had survived, the eldest grandson (the plaintiff) would have succeeded, and it can make no difference that the surviving daughter has interposed.

I am unable to see in any of the passages the least support for the proposition for which they were quoted on behalf of the appellant. *Dáyabhága*, Chap. XI. Sec. II. 15, 30, is dealing with the passage of Manu which permits the husband to take what has vested in his wife and applies to the case of the appointed daughter, and the second passage has the same bearing. It further shows that the heirs are to be sought by proximity to the grandfather and not to the daughter, and the argument *a fortiori* from the case of the widow is certainly adverse to the contention for which it was quoted. Chap. 1, § 10, Sl. 3 of the *Mitákshará* applies to the son of two fathers. The language of the whole section shows the struggle of the commentator to get rid of the texts which allowed of getting by appointment. The passage from the *Saraswatí Vilása* is more than ordinarily obscure, arising, it is very probable, from the arbitrary correction of corrupt manuscripts. Its meaning seems merely to be that the course of the descent is certain in some cases; that where it has vested in daughters it is not so until the birth of sons. It says nothing, however, as to the question of what son is to succeed, and still less in the case of an impartible estate vesting not jointly in all the daughters with equal claims, but in one of them, that it will go to her son only. In my opinion the question can only be solved and may be certainly solved by a recurrence to the principles of the law, and more especially to the principle upon which daughters inherit at all.

In all cases in which the doctrines of one system of law are to be applied by lawyers of another, there is imminent risk of unconsciously reasoning upon motives wholly foreign. This is true of the laws of men whose view of human relations is fairly similar. It is so with the law of the Romans and Germans. Still greater the risk where the view is wholly different.

The interminable disputes as to the quantity of the widow's estate and the talk of full owners, vesting, heritable blood, whether the descent is to be reckoned from the last male owner or the person last seized, present questions wholly insoluble because they are questions without correspondent ideas in the Hindu Law of Inheritance. The Hindu law like the Hindu cosmogony and the Hindu history knows nothing of individuality.

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As Oriental history is well said to be "a compressed "and compacted substance, an undismembered unity within which disturbers have not yet appeared and individu- "ality has not begun to live its life,"—so the leading feature of its earliest written rule is "that the whole of Indian "life in its essential relations is knitted to another world "above and beyond itself, by no means carries its end or its "satisfaction in itself. As Indian philosophy strives before "all things to bind the individual human spirit with the "original godlike one, so the written law orders the life re- "lations of this world for the ends of the other, and the very "godlike which the Hindu sees pantheistically in the world "as totality nevertheless gives to the life that is and its "essential ordinances, e. g. marriage, no godlike import and "sanctity, but merely invites the striving after intimate "union with the primal one (ur-einen.)"*

The law of inheritance, as predominantly marriage also, has an essential relation to the offerings to the dead. Gans (I. 251) has rightly brought forward this, and hence names the Hindu Law of Inheritance "a law of inheritance of the offerings to the dead." "Within the two laws, that of the principal and that of the collateral offerings, the same system of arrangement appears as is shown as the necessary succession of stages of the worship of the dead. First come the worshippers and the providers of the principal offering to the dead; hence the descendants to the great grandson.

* This passage from Ahien's Encyclopœdia 203. All the other quotations which I make are either from him or from the great work of Gans, "Das Erbrecht in Weltgeschichtliehe Entwicklung." An English reader may be permitted to regret the Hegelian terminology in which this great lawyer couches his deductions.

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Here also the right of representation prevails *because among the worshippers there is no nearer who should exclude the more remote.*"

" Then follow those through the medium of whom such worshippers are produced and can be gained for the deceased, hence the wife and the daughter. They inherit not by force of a worth which is their own, as members of the family and nearly related, but *because they are the passive instruments of providing such worshippers for the deceased.* Last of all follow the inheritors of the third relation, *i. e.* those who are connected with the deceased as companions of a common worship. Where, however, no further offering is to be brought, the right of inheritance itself disappears. The bringers of water offerings, Vedas reading Brahmins and the King follow."

I regard this statement of the principle of the Hindu Law of Inheritance to be absolutely correct. As the Roman private law is distinguished and partially disfigured by the prominence given to the individual will, so is the Hindu, in each case springing from the spirit and views of life of the people, characterized by the entire sinking of the individual, by the contemplation of the world as a unity, of the family as unity in multiplicity having no place whatever for individual rights, by regarding the individual himself as a mere link in a chain, and, if the repository of rights, simply so because also the necessary performer of duties. Even in dissolution by which sacred rites are multiplied, and this is Manu's reason, there can scarcely be said to be severance, for the possibility of complete reunion is always regarded. That this is the leading thought pervading the whole Hindu law it seems to me impossible to doubt.

Sir T. Strange (p. 139) says that the *Mitákshará* repudiates the notion of women only succeeding through males, and he quotes for this Chap. II. Sec. 2, Sl. 3, where Katyáyana speaks of the succession of the widow and daughter. This succeeding through males is merely the unconscious application by the English lawyer of the principles of his own law. There is no succession through any one in Hindu law, and in Sl. 6 of the same section the author quotes Vishnu re-asserting

the principle upon which all inheritance depends.—"Let that son give the funeral oblation and possess the inheritance." Now a principle of law, as contradistinguished from mere propositions, is the leading thought upon which the single proposition or entire institutions of law are based. The propositions ought to be deducible from it, and trying the principle by this test it seems to me that it bears it.

If there existed representation in Hindu law and the units were more than the mere passive agents of a work in which their own individual existence has no place, it would be impossible to explain why the descent should stop at the great grandson in the male line and at the grandson in the female. That it is said, somewhere, that in the son the whole body and in a daughter half the body of the father survives, may perhaps be a fanciful mode of expression accounting for the descent stopping a step earlier in the case of the female line.

If vesting could have any influence in determining the right to property, it would be impossible to account for grandsons coming in when the property never vested in the son, for the son of the lunatic, idiot or leprous, taking when his father never could.

On this principle alone can the symbolical begetting and begetting by attorney be explained, and most of the passages which appear to put inheritance upon some other principle owe their rise to the desire to get rid of reasoning which would seem to authorize practices which time and change of manners had rendered repugnant to the writer.

The Hindu commentator did not recognize what legal science, where there is science, has now recognized; that a principle of law is still living though time has by abolishing certain deductions destroyed its logical symmetry, that practical lawyers often apply with great certainty principles of which they are unconscious, and that many of the principles of a law are never to be discovered until itself has passed away.

The principle is—enquire the degrees in which the duty of the sacrifice attaches and you find the order of inheritance.

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That the daughter's sons are entitled the express texts state: that there have been disputes whether the sons do not come in even before the daughters is also clear. That the interposition of the daughter between the grandson and her son was perhaps originally an anomaly, but that interposition, as is plain when once we have cleared our minds of foreign ideas, cannot affect the order of descent. The daughters exclude all daughter's sons, but the offerers of the funeral cake are the sons, and they by virtue of that offering clearly take after the interposition: that one daughter, as in this case, comes in because of the death of plaintiff's mother, can make no difference. At her death if the estate were partible the principle of the law and, as I think, the express text, would bring in all the sons of all the daughters jointly. The fact that it is impartible gives the plaintiff, the elder, the preferable title; but only because it has been settled by custom that the estate is not divisible, and where there is not divisibility the same custom has settled that the elder comes before the younger. These sons are sapindas and they are the class who succeed after daughters.

On the question whether property coming to women by inheritance is stridhanam or not, I do not consider it of the least consequence for the decision of this case to determine. By calling it stridhanam we should not be in the least assisted to the solution of the order of its transmission, for the various sorts of stridhanam are transmitted in very various ways. With respect to property of the grandfather which has passed to daughters because they have generated or may generate sons, it is clear that it passes after the interposition to daughters' sons. Whether it is properly called stridhanam, or, as the judgment of this Court decided, improperly so called, makes not a shade of difference. Whichever it is the order of its descent is settled consentaneously by those who assert and those who deny it to be so. I will shortly sum up the grounds upon which I come to the conclusion that the decree of the Civil Judge ought to be affirmed.

1. The principle of the law is to determine the descent by the nearness or remoteness of connexion with the offering;

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there is no taking by or through or by virtue of any individual, the only effect of relationship is to connect with that offering; the very name Sapinda is the clearest etymological proof of the predominant notion.

2. That this principle is the reason for the daughters taking at all.

3. That neither in this nor in any other case has what is called vesting the slightest influence; the very notion of heritable blood is, as applied to Hindu law, meaningless.

4. The principle of the law is the only safe ground for deducing a rule of descent; the attempt to argue from subordinate propositions will, as the cases show, lead to a departure wider and wider from the real reason of the law.

In this suit for a declaratory decree, I think that there should be no costs on either side.

I must be allowed to add that I feel the grotesque absurdity of applying to these Maravars the doctrine of Hindu Law. It would be just as reasonable to give them the benefit of the Feudal Law of real property. At this late day it is however impossible to act upon one's consciousness of the absurdity. I would not, however, be supposed to be unconscious of it.

Appeal dismissed.

Appellate Jurisdiction. (a)

Criminal Regular Appeal No. 187 *of* 1871.

THE QUEEN *against* ROSS.

To establish the offence of giving false evidence direct proof of the falsity of the statement on which the perjury is assigned is essential. But, as legitimate evidence for this purpose, the law makes no distinction between the testimony of a witness directly falsifying such statement and the contradictory statement of the person charged, although not made on oath. Such a statement when satisfactorily proved is quite as good evidence in proof of the charge as the criminatory statement of a person charged with any other offence and on precisely the same ground,—That it is an admission of the accused person inconsistent with his innocence.

As to the weight to be given to contradictory statements, the sound rule is that a charge of perjury is not maintainable upon proof of one such statement not on oath, or more than one if proved by a single witness only, unless supported by confirmatory evidence tending to show the falsity of the statement in the charge.

With respect to the kind or amount of confirmatory proof required, it must be considered in each case whether the particular evidence offered is sufficient to induce a belief in the truth of the contradictory statement or direct testimony.

1871. *August* 4. *C. R. A. No.* 187 *of* 1871.

THIS was an appeal against the sentence of O. B. Irvine, the Acting Session Judge of Bellary, in Case No. 48 of the Calendar for 1871.

The prisoner was convicted under Sec. 193 of the Indian Penal Code, for that he being summoned as a witness in a certain Calendar case on the file of the Cantonment Magistrate of Bellary, and being bound by oath to state the truth, intentionally gave false evidence by knowingly and falsely stating that he had given Muttu (the defendant in the above mentioned case) leave to take certain doors, whereas he well knew that he had not given them to the said Muttu.

The *Acting Advocate General* and *Miller*, for the appellant.

The facts are sufficiently set forth in the following

JUDGMENT:—The record in this case was called for because of the doubt which the Court was led to entertain as to there being sufficient proof of the wilful falsity of the statement set forth in the charge upon which the appellant has been convicted. After a full consideration of the evidence, we think the case open to a doubt sufficient to render the conviction not safely sustainable.

(a) Present:—Scotland, C. J. and Innes, J.

1871. August 4. C. R. A. No. 187 of 1871.

It was urged by the Acting Advocate General, on behalf of the appellant, that the evidence does not amount to legal proof of the offence of giving false evidence, inasmuch as nothing appears which tends directly to show the falsity of the statement upon which the perjury is assigned, except contradictory statements of the appellant, and, not having been made on oath, those statements are not legitimate evidence in disproof of the truth of the statement in the charge. This, we are of opinion, is not a tenable objection.

There is no doubt that to establish the offence of giving false evidence direct proof of the falsity of the statement on which the perjury is assigned is essential. But, as legitimate evidence for this purpose, the law makes no distinction between the testimony of a witness directly falsifying such statement, and the contradictory statement of the person charged, although not made on oath. Such a statement, when satisfactorily proved, is quite as good evidence in proof of the charge as the criminatory statement of a person charged with any other offence and on precisely the same ground: that it is an admission of the accused person inconsistent with his innocence. The case of *The Queen* v. *Hook*, 27 L. J. Mag. Cas. 222, is a very strong authority for this position. There a conviction for perjury resting, like that in the present case, almost entirely upon oral contradictory statements of the accused not on oath, was upheld by five Judges. The late Lord Chief Baron Pollock in his judgment observes, "No distinction can, I think, be taken between a statement made on oath and one not on oath if made seriously. More than one witness was called to show that on several occasions Hook had stated the exact contrary to what he swore. That is evidence to be received against him."

The weight to be given to contradictory statements is another question. As to that we apprehend the sound rule to be that a charge of perjury is not maintainable upon proof of one such statement not on oath, or more than one if proved by a single witness only, unless supported by confirmatory evidence tending to show the falsity of the statement in the charge: and this on the principle (applicable alike to a case of two contradictory statements on oath, or of direct testimony of falsity by one witness alone) that without such

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confirmatory evidence it could not safely be concluded which of the two opposite statements was false, or which oath was reliable. A good conviction, it is true, may take place on proof of two contradictory statements without confirmatory evidence as to the falsity of either, when both are on oath and made the subject of separate charges, but that is because the Code of Criminal Procedure provides for a conviction in such a case upon an alternative finding as to the truth or falsity of one or the other statement (*Palany Chetty's case*, IV. M. H. C. R. 51).

With respect to the kind or amount of confirmatory proof required no general rule can be laid down. In each case it must be considered whether the particular evidence offered is sufficient to induce a belief in the truth of the contradictory statement or direct testimony. See *The Queen* v. *Boulter*, 21 L. J. Mag. Cas. 57. But there is no doubt that in every case of perjury repeated contradictory statements whether on oath or not on oath, or statements inconsistent with the truth of what is alleged in the charge to be false, when proved by different witnesses, are good confirmatory proof. This is very distinctly pointed out in *The Queen* v. *Mayhew*, 6 C. & P. 315, and the judgments in *The Queen* v. *Hook*.

Applying those rules to the present case, what is the effect of the evidence? It is certain that the appellant meant by his statement in the charge that he had done or said what was equivalent to permission to take the doors, and there is distinct proof of several statements made by him to three witnesses directly contradictory of that. On the 19th he said to the Police Constable, in answer to his enquiries about the charge, that the horsekeeper had stolen the doors. The next morning the Police Inspector Mr. Shortt called, in consequence of the receipt of the letter (C) asking the release of the horsekeeper, and he deposes that in the conversation then had the appellant said, that the horsekeeper had come to him and said that he had intended asking for the doors but that he did not believe him, and was very emphatic in his assertion that the doors had been stolen. He also deposes that on the 24th and on the 25th March (the day of the horsekeeper's trial) the appellant said he had been summoned as a witness by the

horsekeeper and that he was foolish to do so as he could give no evidence in his favor. Again, it is proved by Mr. Firth (7th witness) that, on the 23d March, the appellant stated to him that his doors had been stolen. That the horsekeeper said he intended asking for them but he did not believe him. This is not only sufficient proof of the contradictory statements, but each witness's testimony is confirmatory of the truth of what was repeated in the distinct statements, and so is the letter (C) which contains a similar statement as to the horsekeeper's saying he intended asking. Additional confirmation, too, is afforded by the evidence of the 2nd witness who saw the doors removed and concealed. The acts deposed to by that witness appear irreconcileable with leave of any kind having been given or supposed to be given.

This is cogent evidence to show the untruthfulness of the statement in the charge, but there appears to be room for a doubt in favor of the appellant's statement in defence, that what he had said on oath accorded with facts brought to his recollection subsequent to the charge of theft. Between the time of the latest statements to Mr Shortt and the appellant's examination, a representation of circumstances altering his belief might have been made, and although the statement does not give the impression that it referred to so recent an occurrence, and the likelihood is that he would be reminded of such circumstances before the day of trial when he was summoned as a witness for the horsekeeper, still the evidence cannot, we think, be safely said to exclude belief in such a representation having taken place in that interval. The fact that the appellant swore in contradiction to what he had so recently before said rather tends to support that belief. These considerations and the circumstances of the appellant's character and position in life ; and the absence of any thing suggestive even of the least material advantage to be gained, or personal motive served by screening the horsekeeper from the charge that he had himself laid, give rise to a doubt in our minds as to the wilful falsity of the statement in the charge, which, after some hesitation, we think enough to justify our considering the evidence not conclusive proof of the appellant's guilt. The conviction and sentence, therefore, will be annulled and the appellant discharged.

Conviction annulled.

Appellate Jurisdiction. (a)

Civil Miscellaneous Special Appeal No. 170 *of* 1870.

HANINABALU SANNAPPA..............*Appellant.*

Mrs. COOK, widow of FRANCIS O. COOK, and J. MILLER, Esq., Administrator General. } *Respondents.*

Plaintiff on the 15th June 1868, immediately after the death of his debtor, brought a suit against the debtor's widow (1st defendant) for recovery of the debt and, before judgment, obtained attachment and sale of property of the deceased, the sale proceeds being kept in deposit in the Court. These proceedings took place in June and July, and on the 15th August administration was granted to the Administrator General, the widow not having taken out administration. On the 28th September the Administrator General was, on plaintiff's application, made defendant in place of the widow and the suit proceeded against him to decree. Before plaintiff applied to execute this decree the amount of the sale proceeds was, by the direction of the Civil Judge, handed over to the Administrator General; accordingly, on this ground plaintiff's application to the District Munsif for execution was rejected. He appealed unsuccessfully to the Civil Court. *Held,* on special appeal, that Section 33 of Act XXIV of 1867 took away plaintiff's right to payment otherwise than rateably with the other creditors.

1871. *August* 12. *C. M. S. A. No.* 170 *of* 1870.

THIS was a special appeal against the order of O. B. Irvine, the Civil Judge of Bellary, dated the 23rd February 1870, dismissing Miscellaneous Petition No. 106 of 1870, presented against the order of the Court of the District Munsif of Bellary passed on Miscellaneous Petition No. 506 of 1869.

Scharlieb for the appellant, the plaintiff.

The Acting Advocate General for the 2nd respondent, the 2nd defendant.

The facts sufficiently appear in the following

JUDGMENT:—The question for determination in this appeal is whether the Civil Court has erred in dismissing the plaintiff's appeal from the order of the District Munsif's Court rejecting his application for satisfaction of a decree out of the sale proceeds of the deceased's debtor's property.

It appears that on the 15th June 1868, immediately after the death of his debtor, the plaintiff brought a suit against the debtor's widow (the 1st defendant) for the recovery of the debt and obtained therein before judgment the attachment and sale of property of the deceased; and the sale

(a) Present:—Scotland, C. J. and Innes, J.

1871. August 12. C. M. S. A. No. 170 of 1870.

proceeds were kept in deposit in the Court. These proceedings took place in June and July, and on the 15th of August administration of the deceased's estate was granted to the Administrator General, administration not having been taken out by the widow. On the 28th September the Administrator General was, on the application of the plaintiff, made defendant in the suit in place of the widow, and the suit was duly proceeded with against him to decree. Either before the decree or after it, and before the application for its execution, the amount of the sale proceeds was by the direction of the Civil Judge handed over to the Administrator General, and this was the ground of the rejection of the plaintiff's application for execution by the District Munsif, against which the plaintiff appealed unsuccessfully to the Civil Court.

The point on which the question turns is the right of the Administrator General, under Act XXIV of 1867, to withhold the money and apply it rateably towards the discharge of the debt decreed to the plaintiff and the other debts due by the intestate. It is difficult to discover the ground of the widow's liability to the suit. The ground now put forward, that she had made herself executrix of her own wrong, does not appear to be supported by evidence in the suit. But in the present appeal we must take it that the suit, although not well brought against the widow, was rightly upheld and the decree duly passed against the Administrator General in his representative character as supplemental defendant. The case, then, must be dealt with as a suit brought against the Administrator General.

Applying Section 33 of Act XXIV of 1867 to this conclusion, it is, we think, fatal to the plaintiff's claim to the sale proceeds. It enacts that in such a suit the plaintiff "shall "not be entitled to have the decree (if any) enforced unless "upon proof by affidavit or otherwise that not less than one "calendar month previous to the institution of the suit he "had applied in writing to the Administrator General, stating "the amount and other particulars of the claim, and supporting the same by such evidence as, under the circumstances "of the case, the Administrator General was reasonably "entitled to require, and that the Administrator-General had

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"refused or neglected to register the claim according to the "practice of his office. If in any such suit judgment is pro-"nounced in favor of the plaintiff, he shall nevertheless be "only entitled to payment out of the assets of the deceased "*pari passu* with the other creditors."

It is unnecessary to consider whether the institution of the suit groundlessly against the widow alone, before administration was obtained by the Administrator General, renders the condition as to proof inapplicable to the plaintiff. For even assuming the inapplicability of that condition, it is clear that the concluding provision of the section takes away his right to payment otherwise than rateably with other creditors. It follows that the sale proceeds could not have been legally ordered to be paid in satisfaction of the decree, and the plaintiff can now obtain payment from the Administrator General of the amount which he is entitled to receive in due course.

For these reasons we think the orders of the Lower Courts against the plaintiff's application sustainable. It becomes unnecessary to say any thing as to the Civil Judge's power to make the transfer of the sale proceeds to the Administrator General under Section 61 of the Act. The Appeal must be dismissed and the appellant must pay one set of costs to the respondents.

Appeal dismissed.

Appellate Jurisdiction. (a)

Referred Case No. 30 of 1871.

PETER PILLAI..........................*Plaintiff.*

KRISTNA A'YYAN..........................*Defendant.*

A. a judgment-creditor of the defendant, attached his property but took no further step. B. another judgment-creditor, subsequently attached and sold the property. *Held,* that the decree-holder who first attached the property of the judgment-debtor did not forfeit his prior right to payment under Section 270 of the Civil Procedure Code by delaying to obtain an order for the sale of the property upon his attachment.

1871. August 14. R. C. No. 30 of 1871.

THIS was a case referred for the opinion of the High Court by A. J. Mangalam, the District Munsif of Tripatúr, in Small Cause Suit No. 536 of 1870.

In the execution of the decree in the above suit certain property of the defendant was attached on the application

(a) Present:—Scotland, C. J. and Innes, J.

of the plaintiff. This property had been previously attached by another judgment-creditor of the same defendant, but he took no steps for selling the property. The present plaintiff, however, carried his attachment into effect by a sale of the property, duly made, by order of the Court, upon his application. The Munsif referred the question—"Whether Muhammad Lubbai Sahib, who first attached the property, but did nothing more, or the present plaintiff who carried his attachment into effect, is entitled to be first paid out of the proceeds of the sale?"

1871. *August* 14. *R. C. No.* 30 *of* 1871.

No Counsel were instructed.

The Court delivered the following

JUDGMENT:—We are of opinion that the decree-holder who first attached the property of the judgment-debtor did not forfeit his prior right to payment under Section 270 of the Code of Civil Procedure by delaying to obtain an order for the sale of the property upon his attachment.

The valid charge upon the property created by his attachment was subsisting when the other decree-holder procured the sale of the property, and there is nothing in Section 270 to restrict its application to a sale at the instance of the decree-holder who first attached the property. It gives the prior right in general language "whenever property is sold in execution of a decree." A decree-holder who sues out a second attachment and sells the property, takes the risk of there being no surplus proceeds after payment of the debt of the creditor first attaching.

Appellate Jurisdiction. (a)

Criminal Petition No. 287 *of* 1871.

TOTI CHENGAN......*Petitioner.*

In computing the time during which it is competent to a defendant to appeal against the sentence of a Magistrate the number of days taken by the Court to prepare a copy of the sentence should be omitted.

THIS was an application under Section 404 of the Criminal Procedure Code, praying the High Court to revise the

1871. *November* 2. *C. P. No.* 287 *of* 1871.

(a) Present:—Scotland, C. J. and Holloway, J.

1871. November 2. C. P. No. 287 of 1871.

proceedings of the Court of Session of Chittúr, dated 5th August 1871, rejecting an appeal preferred against the decision of the Assistant Magistrate of North Arcot in case No. 40 of the Calendar for 1871 on the ground of its having been presented out of time.

No Counsel were instructed.

The Court delivered the following

JUDGMENT :—In this case we are of opinion that the Session Judge committed an error of procedure in not receiving the Petitioner's appeal and disposing of it on the merits. The sentence appealed from was passed on the 26th June. Copy of that sentence was applied for on the 11th July and stamp paper furnished on the 13th idem. The copy was ready for delivery on 19th but was not actually delivered until the 24th. The appeal was presented on the 27th and rejected, because no ground had been shown for the non-presentation within the thirty days allowed by law. If the period between the 13th and 19th be deducted, in accordance with the practice of deducting every day of delay in obtaining copies not attributable to the party, the appeal was within time. The above rule of computing the period of appeal was introduced by Act XXXV of 1837 (repealed by Act X of 1861) and has continued in force under a rule of the late Sadr Court in the case of appeals from decrees, but it has been adopted and recognized as a general rule of practice in the case of appeals from sentences passed on criminals, and until such practice is altered by an order of this Court it must be observed. The petition of appeal should now be received and disposed of on the merits.

Appellate Jurisdiction. (a)

Referred Case No. 34 *of* 1871.

PACHAIPERUMAL CHETTI

against

SAVA'YYAR AUDONI KURUSU RAVVEL.

The effect of the first and fourth clauses of Section 2 of the Indian Registration Act of 1871, read with the provision in the first Schedule as to the extent of the repeal of Act VII of 1870, is to keep in force all the provisions of Act XX of 1866 relating to the procedure for the recovery in a summary way of the amount of an obligation upon agreements recorded under Section 52 of that Act, before the 1st day of July 1871.

1871. *November* 6. *R. C. No.* 34 *of* 1871.

THIS was a case referred for the opinion of the High Court by H. Subráya A'yyar, the District Munsif of Strívikundum.

A petition was presented to the Court of the District Munsif on the 1st August 1871, under Section 53 of the Indian Registration Act XX of 1866, praying for an order to draw up a decree in favor of the Petitioner for Rs. 497 and costs, under a specially registered bond, dated 20th July 1869.

The District Munsif doubted what stamp the petition should bear and he referred the question. In his statement of the case he said,—

" The petition bore a stamp of one-half the value prescribed for the plaint in a regular suit brought to recover the amount specified in the bond in question.

The stamp duty appears to have been paid under Schedule 1, Article 3 of the Court Fees' Act VII of 1870, which is not now in force, it having been repealed by the first Schedule annexed to the new Indian Registration Act VIII of 1871. The new Registration Act of 1871 does not provide how stamp duty should be levied in the case of petitions presented under Section 53, Act XX of 1866. The last paragraph of Section 2 of the new Indian Registration Act recites as follows :—" And nothing herein contained affects Act XX of 1866, so far as relates to the procedure upon any agreement recorded under Section 52 of that Act at any

(a) Present :—Scotland, C. J. and Innes, J.

1871. November 6. R. C. No. 34 of 1871.

time before that day" (1st April 1873). As that part of Section 53 of Act XX of 1866 which provided for the levy of stamp duty in summary suits instituted under the Act, was repealed by the Court Fees' Act, I doubt whether Section 2 of the New Indian Registration Act gives any effect to Section 53 of Act XX of 1866 with regard to the levy of stamp duty."

No Counsel were instructed.

The Court delivered the following

JUDGMENT :—We are of opinion that the effect of the first and fourth Clauses of Section 2 of the Indian Registration Act of 1871, read with the provision in the 1st Schedule as to the extent of the repeal of Act VII of 1870, is to keep in force all the provisions of Act XX of 1866 relating to the procedure for the recovery in a summary way of the amount of an obligation upon agreements recorded under Section 52 of that Act, before the first day of July 1871. Consequently that the stamp duty leviable upon the petition in the present case is one-fourth the value prescribed for a plaint in such a suit.

Appellate Jurisdiction. (a)

Special Appeal No. 198 *of* 1870.

Messrs. MACKINNON and MACKENZIE, Agents of the British India Steam Navigation Company... } *Special Appellants.*

Mr. CHARLES MINCHIN, Attorney on behalf of Messrs. ARBUTHNOT and COMPANY...................... } *Special Respondent.*

A. and Co. at Madras shipped by the B. I. S. N. Steamer "*Mahratta*" a box of coral to be delivered to their Agent M. at Bimlipatam. At the time of shipment they declared the value and paid enhanced freight on account of such value. By the bill of lading the Company undertook to deliver the case in good order at Bimlipatam to the consignee M. subject to certain conditions annexed. By one of those conditions if the consignee did not take delivery when the ship was ready to discharge, the goods might be warehoused at the merchant's risk, and the Company's liability was to cease when the goods left the ship's side. The consignee did not take delivery at the ship's side, and the Company's Agent at Bimlipatam took the case to the Custom-house as he was bound to do by the Regulations of the Port. If the Superintendent of the Custom-house had known that the case contained corals, it would have been placed in an inner room, but the Company's Agent did not know the contents of the case, and therefore was unable to give any such information to the Superintendent. While the case was lying at the Custom-house, application was made on plaintiffs' behalf to the Company's Agent for delivery of the case upon the usual guarantee. The Agent refused to deliver the case without the production of the bill of lading. Afterwards the bill of lading was received from Madras and the case was delivered up. At some time between its leaving the ship's side and delivery to the consignee the case was opened and a portion of the contents stolen. *Held*, that the defendants were not liable.

1871. *July* 17. *S. A. No.* 198 *of* 1870.

THIS was a special appeal against the decision of E. C. G. Thomas, the Civil Judge of Vizagapatam, in Regular Appeal No. 145 of 1868, modifying the decree of the Court of the Principal Sadr Amín of Vizagapatam in Original Suit No. 22 of 1867.

Handley for the special appellants, the defendants.

Sloan for the special respondent, the plaintiff.

The Court delivered the following judgments in which the facts sufficiently appear.—

KINDERSLEY, J.—I understand the following to be the principal facts of the case. Arbuthnot and Company at Madras shipped by the British India Steam Navigation Company's Steamer "*Mahratta,*" a box of coral to be delivered to their Agent Mackie at Bimlipatam. At the time of

(a) Present :—Holloway and Kindersley, J. J.

1871. July 17. S. A. No. 198 of 1870.

shipment they declared the value of the case to be Rs. 9,500, and paid enhanced freight on account of such value. By the bill of lading, the Company undertook to deliver the case in good order at Bimlipatam to the consignee Mackie, subject to certain conditions annexed. By one of those conditions if the consignee did not take delivery when the ship was ready to discharge, the goods might be warehoused at the merchant's risk, and the Company's liability was to cease when the goods left the ship's side. The consignee did not take delivery at the ship's side, and the Company's Agent at Bimlipatam took the case to the Custom-house, as he was bound to do by the Regulations of the Port. It appears that if the Superintendent of the Custom-house had been aware that the case contained corals, it would have been placed in an inner room and taken greater care of; but the Company's Agent did not know that the case contained corals, and therefore he was unable to give any such information to the Superintendent of the Custom-house. While the case was lying at the Custom-house Mr. Minchin applied on plaintiff's behalf to the Company's Agent for delivery of the case upon the usual guarantee. The Agent refused to deliver the case without the production of the bill of lading. Afterwards the bill of lading was received from Madras, and the case was delivered up. In the meantime, while lying at the Custom-house, the case had been opened and a portion of the contents stolen. The question is whether the defendants are responsible.

It appears from the conditions of the bill of lading that the defendants performed their duty as carriers by carrying the case to Bimlipatam, where the consignee ought to have taken delivery at the ship's side. And there appears to be no enactment, nor any rule of law in force in British India, which should prevent our giving effect to such conditions. If therefore, the defendants through their Agents landed the case at Bimlipatam, and lodged it at the Custom-house, they did so, not in the character of carriers, but as gratuitous bailees; and as gratuitous bailees they would be responsible only for what has been termed gross negligence. Now it seems impossible to maintain that the defendant's agent was guilty of such negligence. He was bound by the Regulations

of Government to convey the goods straight to the Custom-house, and he appears to have done so, and to have delivered the case in good order to the Superintendent.

He was not bound to know the contents of the case, nor to declare it to the Superintendent. And it was while the case was in the custody of the Custom-house officers that the damage took place. I am therefore of opinion that the decree of the Civil Judge ought to be reversed, and the suit dismissed with costs.

HOLLOWAY, J.—I am of the same opinion for the reasons given by me at considerable length at the hearing, which I will shortly resume.

There is absolutely no evidence that the box was plundered while in the verandah. If it had been, it could not have been said that the violation of any duty imposed upon the defendants was the cause of the loss. There was a duty imposed by the Regulations of the Port to lodge in the Custom-house. Its continuance there was the result of no wrong, for defendants' agents were not bound to surrender the goods without the production of the bill of lading. The refusal may have been an unfriendly and capricious exercise of a legal right, but this is no injury. The defendants had a right by the contract to land and wharve the goods at the consignee's expense, and the rules of the Custom-house compelled the wharving in the place in which they were lodged. Whether the mode of meeting the convenience of steamers should not be the putting of the Custom-house manager to a little inconvenience for the public benefit, rather than the loose mode which appears to be adopted at Vizagapatam, is a question which it appears to me that the authorities may advantageously consider. In the capacity of carriers, the evidence is that the duty of the defendants was fulfilled; the duty which their mode of procedure imposed upon them as boatmen and carriers is not proved to have been violated. That the loss resulted from such violation is of course, therefore, unproved. How or when it happened is wholly unproved.

Appellate Jurisdiction. (a)

Regular Appeal No. 94 *of* 1870.

NABOB AMIRUDDAULA MUHAMMAD KAKYA HUSSAIN KHAN BA'HA'DU'R AMIR JUNG VARU, JAGHIRDA'R of VIRUTHALABATHI. } *Appellant.*

NATERI SRI'NIVA'SA CHARLU and 5 others....*Respondents.*

Plaintiff during his son's minority gave certain property to him and on the delivery of possession got from him a document stipulating—(1.) That he would not alienate. (2.) That at his death the property should return to the father. This document was deposited with the father and not heard of until the property was taken in execution for the son's debts many years after the gift. *Held*, that by Muhammadan Law as well as by the general principles of law, such a restriction on alienation, especially after the gift had become complete long before, is absolutely invalid.

1871. *November* 20. *R. A. No.* 94 *of* 1870.

THIS was a Regular Appeal against the decision of C. G. Plumer, the Acting Civil Judge of Chittúr, in Original Suit No. 48 of 1869.

The suit was brought to establish plaintiff's right to cawnies 9-6-12 of nanja, punja and poramboke lands with bungalows, wells, and fruit trees attached, after cancellation of the sale of the said property by order of the Court, and to direct defendant to pay plaintiff further produce and costs.

The plaint set forth that plaintiff allowed his son Nazim Jung to enjoy the aforesaid property for 20 years until his death in November 1868; that at his death plaintiff resumed the possession of the property and enjoyed it until its attachment; that 1st defendant illegally caused the attachment of the said property in satisfaction of a decree obtained by him in the High Court against 2nd defendant; that the defendants 3—6 purchased different portions of the aforesaid property; that 2nd defendant had no right to the property; that he was not the legal heir of Nazim Jung, but merely his illegitimate son by a maid servant.

The 1st defendant alleged in his written statement that the debt the 2nd defendant agreed to pay was the same debt that was due by his deceased father Samsamuddaula Nazim Jung to the 1st defendant, and that the promissory note had been executed by the 2nd defendant with the permission and consent of the said Nazim Jung; that the possession of the

(a) Present:—Holloway and Kindersley, J. J.

lands in dispute was never obtained by the plaintiff after the death of the said Nazim Jung; that the plaintiff's statement that he had been for more than 20 years out of the possession of the lands, showed that the suit was barred by the Act of Limitations; that letters of administration were with the consent of the 2nd defendant granted to the plaintiff, who in consequence had under his management the lands in dispute; that the plaintiff had in the petition presented by him and the 2nd defendant to the High Court at Madras on the 3rd December 1868, for the purpose of obtaining letters of administration, fully admitted the fact of the 2nd defendant being the son of the said Nazim Jung; that the plaintiff having by the execution of a hibbah made over to his son the lands in dispute, his present claim for the recovery of the same could not stand good in law, and that the plaintiff's claim should be dismissed with costs, and he be directed to pay his (defendant's) costs.

The 2nd defendant alleged that the property in dispute was obtained by his father by virtue of a hibbah and purchase; that his father having been indebted to the 1st defendant, directed him (2nd defendant) to execute a bond; he accordingly executed to the 1st defendant a note of hand on which he (the 1st defendant) obtained a decree in No. 69 of 1859, High Court's file; that he was not liable for that judgment debt, which ought to be recovered by means of the property belonging to his father; that the plaintiff had no right whatever to interfere in case of the same being made available for the payment of his father's debt; and that the property had not at any time been in the plaintiff's possession; that the plaintiff by a petition to the High Court fully admitted the fact of this defendant being publicly known as the son of Nazim Jung.

Plaintiff grounded his claim to the property on the fact that in the hibbanáma, by which 2nd defendant admitted in his written statement that Nazim Jung obtained possession of the property in dispute, and which was executed by plaintiff to Nazim Jung (his son), a power of resumption of the property was reserved to plaintiff on the death of Nazim Jung.

1871. November 20. R. A. No. 94 of 1870.

The plaintiff, however, failed to produce this hibbanáma or to account for its non-production, and the Civil Judge dismissed his suit under Sec. 148 of the Civil Procedure Code.

The plaintiff appealed.

The appeal was first heard on the 10th March 1871, when the High Court referred the following issue to the Civil Court—Whether the gift to plaintiff's son contained a power of resumption?

At the trial of this issue the plaintiff filed a karárnáma (A) executed by plaintiff's son to plaintiff which contained the following "you have out of your paternal affection towards me granted the same (*certain houses and lands*) to me for the specific purpose of supporting myself and the koran readers, &c. The said garden and land are your property; I will not sell it to any body nor shall I make a gift of it to any one. Should I depart this life, the said property shall go and revert to you, and so it is not my property."

The Civil Judge found that the gift to plaintiff's son was accompanied by an agreement that in the event of his death the property should revert to the plaintiff.

Upon the return of this finding the case came on again for hearing on the 14th August.

Venkatapathi Rau for the appellant, the plaintiff.

Rangaiya Nayudu for the 3rd, and *Ráma Rau* for the 4th and 6th respondents, the defendants.

The following judgment was delivered by

HOLLOWAY, J.—On the issue referred the Civil Judge has found that the collateral agreement A was executed by the deceased donee. Undoubtedly there are very suspicious points connected with the plaintiff's case, but with a full view of the whole of them, although with some hesitation, the Civil Judge has come to the conclusion that the evidence of plaintiff ought not to be discredited. We could not come to a different conclusion whatever doubts we might feel.

It remains then to consider its effect in point of law. The facts are that the plaintiff during his son's minority

1871. November 20. R. A. No. 94 of 1870.

gave this property to him. By Muhammadan Law that gift was complete without delivery (Baillie I. 529). It became the son's from the date of the first transaction. By that law if possession had not been delivered, there would have been a right to take it, or during his minority any member of his family could have done so for him (530). I refer to these principles, not as binding, but as an index to the intent of the parties. Then on the delivery of possession the father gets from his son this document stipulating:—

1. That he will not alienate.

2. That at his death the property shall return to the father.

This document is deposited with the father and not heard of until the property is taken in execution for the son's debts.

According to the general principles of law such a restriction on alienation, especially after the gift had become complete long before, would have been absolutely invalid. It is so also by Muhammadan Law. Such a condition annexed to a gift is absolutely void (Baillie, 537), because repugnant to the principle of the transaction upon which it is sought to engraft it. It must be void *à fortiori* as a mere contract following long after a complete gift. I entertain no doubt that the rule of the Muhammadan Law is a sound rule and ought to be applied. Nothing could be more inequitable than to allow the visible means of a man, to whom credit has been given, to be narrowed by a secret contract with the person who has given the debtor the opportunity of appearing as owner. It is only necessary to add that by Muhammadan Law the quality of irrevocability will be attached to the gift (524).

I am of opinion that the principles of jurisprudence, with which the rules of Muhammadan Law are here accordant, forbid our giving effect to this document. The Original Suit ought to be dismissed and with costs.

KINDERSLEY, J.—I concur in this judgment.

Appellate Jurisdiction. (a)

Civil Miscellaneous Petition No. 224 *of* 1871.

ANNAMALAI CHETTI... ... ...*Petitioner.*

MUTHULINGA PILLAI, and another...*Counter-Petitioners.*

RANGAPPA NAICK. ... ...*Suppl. Counter Petr.*

Petitioner bought at Court sale certain property which had been attached in O. S. No. 30 of 1860 on the file of the District Munsif's Court. Before, however, the sale certificate was issued to him, the plaintiff in O. S. No. 79 of 1866 presented a petition praying for a re-sale of the property on the ground that it had been sold at an undervalue. On this petition the Munsif cancelled the former sale and ordered a re-sale. Before this re-sale took place the property was sold in execution of the decree in Suit No. 3 of 1866 on the file of the Civil Court and purchased by the plaintiff in that suit. Thereupon petitioner applied to the Munsif to re-sell the property in satisfaction of his claim. The Munsif refused to do so and the Civil Judge, upon appeal, confirmed the Munsif's order. *Held*, on Special Appeal, that the Munsif's first order, annulling the sale, was a nullity, and the subsequent attachment and sale under the decree in O. S. No. 3 of 1866 inoperative against the property. That consequently, the appellant was entitled to have these proceedings set aside and the validity of his sale upheld, if the respondent's objection that the orders were not open to question in the High Court should not prevail. Upon the latter point *Held*, that no right of appeal existed, but that, therefore, the Civil Court had no jurisdiction to entertain the appeal to that Court, and, giving effect to the petition of special appeal as a petition under Section 35 of Act XXIII of 1861, that the orders of the Lower Courts should be annulled and the Petitioner declared entitled to an order and certificate perfecting his title.

1871. *October* 27. *C. M. P. No.* 224 *of* 1871.

THIS was a Petition against the order of G. Ellis, the Civil Judge of Coimbatore, dated the 3rd March 1871, passed on Civil Miscellaneous Petition No. 42 of 1871, confirming the order of the District Munsif of Udumálpetta passed on Miscellaneous Petitions Nos. 1378 of 1869, and 1278 of 1870.

Petitioner bought at Court sale certain property which had been attached in O. S. No. 30 of 1860 on the file of the District Munsif's Court. Before, however, the sale certificate was issued to him, one Ramakrishna Chetti, plaintiff in O. S. No. 79 of 1866, presented a petition praying for a re-sale of the property on the ground that it had been sold at an undervalue. On this petition the Munsif cancelled the former sale and ordered a re-sale of the property. Before this re-sale took place the property was sold in execution of the decree in Suit No. 3 of 1866 on the file of the Civil Court and purchased by the plaintiff in that suit.

(a) Present :—Scotland, C. J. and Innes, J.

Thereupon Petitioner applied to the Munsif to re-sell the property in satisfaction of his claim. The Munsif refused to do so and the Civil Judge, upon appeal, confirmed the Munsif's order. Petitioner appealed to the High Court upon the grounds that

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1. Inasmuch as his sale only was set aside, his first attachment was still operative, and he was entitled to a re-sale thereunder.

2. The whole proceedings were irregular.

Johnstone for the petitioner.

Handley for the supplemental counter-petitioner.

The Court delivered the following

JUDGMENT:—Treating this petition of appeal as we think it ought to be treated, as involving not only the validity of the order of the District Munsif refusing to attach the property in dispute a second time on the appellant's application, which has been affirmed by the Civil Court; but also the validity of the District Munsif's first order annulling the Court sale under the appellant's decree; we are of opinion that the latter order is altogether a nullity.

The sale could only have been set aside for such irregularity as is specified in Section 256 of the Code of Civil Procedure, and no such irregularity appears to have taken place. The appellant, therefore, was entitled to the order and certificate, perfecting his title as purchaser, provided for by Sections 257 and 259. The District Munsif's first order, consequently, was made without jurisdiction, and the subsequent attachment and sale in execution of the decree in Original Suit No. 3 of 1866 in the Civil Court was inoperative against the property. This being so, the appellant is entitled to have the District Munsif's first order, as well as his second order and the order of the Civil Court confirming the latter, set aside, and the validity of his sale upheld, if the respondent's objection that the orders were not open to question in this Court should not prevail.

We are of opinion that no right of appeal existed, but not upon the ground on which the objection is rested that

1871. October 27. C. M. P. No. 224 of 1871.

the appeal was expressly prohibited by Section 257 of the Code of Civil Procedure. That section enacts that "if no such application as is mentioned in the last preceding section be made, or if such application be made and the objection be disallowed, the Court shall pass an order confirming the sale; and in like manner if such application be made, and if the objection be allowed, the Court shall pass an order setting aside the sale for irregularity. If the objection be allowed, the order made to set aside the sale shall be final." This enactment obviously restricts the jurisdiction to make an order setting aside a sale to the cases of irregularity specified in Section 256, and shows that it is to orders made in such cases, and to those alone, that the provision of finality applies. Now the first order of the District Munsif is not merely upon a ground for which the section does not provide, but is absolutely contrary to it, and is clearly therefore not an order made final by Section 257, but one wholly 'ultra vires.'

We rest our decision as to this point upon the ground that the Code of Civil Procedure does not provide for an appeal in such a case. Section 23 of Act XXIII of 1861, which is the only section that could be held to do so, does not, we think, admit of that construction. We have some hesitation as to whether it applies to orders made in execution of decrees, but it is difficult to put a different construction upon the word "decrees" from that which the same word has been held by the High Court of Bengal to bear in Section 376, providing for review of Judgment. See *Suth. Full B. Rep.* 235. Taking the section to apply to such orders, we are at present of opinion that the right of appeal is given only as between the parties to the suit in which the decree or order was made. And here the person on whose application the sale to the Petitioner was set aside was not a party to the suit in which the Munsif's order setting it aside was passed. He was before the Munsif's Court on the passing of the order as the holder of a decree in another suit. Nor was the present Petitioner a party to the suit on which the second order was made, refusing to set aside the second sale which had taken place.

The right of appeal not existing, the Civil Court had no jurisdiction to entertain the appeal to that Court, and giving effect to the Petition of appeal as a Petition under Section 35 of Act XXIII of 1861, as we think in the circumstances of this case should be done, the order of that Court must be set aside. And following this Court's decision in 6 H. C. R. 22 (*Subraiya Gaundan* v. *Venkatagiri Aiyar and* 5 *others*), we are of opinion that under the jurisdiction given by the latter part of the section the invalid orders of the District Munsif should also be annulled. The effect of which will be to entitle the Petitioner to an order and certificate perfecting his title. The parties will bear their own costs in this and the Lower Courts.

1871. *October* 27. *C. M. P. No.* 224 *of* 1871.

Appellate Jurisdiction. (a)

Referred Case No. 39 *of* 1871.

G. L. MORRIS, ESQ., Receiver and Manager of the Tanjore Estate *against* MUTHUSA'MI PILLAI, and another.

The suit was brought by the plaintiff, as Receiver of the Tanjore Estate, to recover from the 1st defendant, a farmer, a sum of money alleged to be rent due to the Tanjore estate under a written agreement executed in August 1866 by the 1st defendant to the 2nd defendant who then claimed to be owner of the estate. The Judge of the Court of Small Causes considered that the subject-matter of the plaint did not constitute a cause of action to the plaintiff, and dismissed the plaint subject to the opinion of the High Court. *Held*, that the suit was maintainable by the Receiver to recover the fair rent payable for the use and occupation of the land under the Muchalka, which was good evidence of what was the fair amount of rent. The 2nd defendant having been held to possess no title to the property could not afterwards maintain an action for the non-payment of the rent of a portion of such property, due according to the terms of the Muchalka.

Held, also, that the right of suit did not extend to recover anything as interest on the rent due.

THIS was a case referred for the opinion of the High Court by J. H. Nelson, the Judge of the Court of Small Causes at Combaconum.

1871. *November* 8. *R. C. No.* 39 *of* 1871.

The following was the case stated,—

"This is a suit brought for the recovery from the 1st defendant, a farmer, of Rs. 61-15-1, being the balance of a sum of money alleged to be due to the Tanjore estate under a written agreement, dated 20th August 1866. The plaintiff is G. L. Morris, Esquire, the Collector of the Tanjore District,

(a) Present:—Scotland, C. J. and Innes, J.

1871. November 8. R. C. No. 39 of 1871.

and he sues as being the appointed Receiver for the Tanjore estate. The written agreement purports to have been executed in favor of the 2nd defendant, who is styled in the same His Royal Highness (Dívanum Averghal) Mahārája Rája Srí Sarab'hôji Sahib, and who at the time of its execution appears to have claimed to be the adopted son of the late Rája of Tanjore, and as such to be the sole owner and exclusive possessor of the Tanjore estate. And it is stated in the plaint that the 2nd defendant is made a co-defendant as being a 'name-lender.'

The plaint was presented on the 27th May 1869, and in December of the same year was brought before me for scrutiny previous to registration. And upon consideration I came to the conclusion that the subject-matter of the plaint did not constitute a cause of action to the plaintiff, and rejected the plaint under Section 32 of the Code of Civil Procedure.

Subsequently, on the 8th October 1870, the plaintiff's successor in the office of Receiver presented an application for the review of my order rejecting his predecessor's plaint, and in doing so called my attention to the following passage in the Judgment of the High Court in Regular Appeal No. 93 of 1870, which comments on the mode in which I dealt with a suit similar to the present, in which the Receiver wished to intervene and recover the whole sum claimed by the plaintiff in that suit, who is the 2nd defendant in this suit. The passage is as follows :—" The fact is that Surfogí, whose title to the land had been set aside by the decree of this Court, had been suing upon a contract with defendant and his suit had been dismissed. If the time of the currency of that suit is deducted, the action is in time. The Small Causes Court Judge refused to admit the plaintiff in place of Surfogí, although he had manifestly taken all interest in the land as representing the persons for whom he was Receiver. It seems to me that it was quite open to the present plaintiff at his election either to affirm or disaffirm Surfogí's contract, and that, having elected to confirm it, he should have been admitted into the suit. Then, however, comes the dilemma :—Coming in as successor to Surfogí and suing

upon the obligation created by his contract, the plaintiff is barred by *res judicata*. Coming in paramount to him and upon a discordant title, Surfogi's proceedings were no interruption of the period of limitation, because then Surfogi is not the person under whom he claims. It is very melancholy that substantial justice should be defeated by supra-subtile procedure, and specially in Small Cause Courts, in which such mischievous devices are peculiarly mischievous. If the plaintiff had asked that a case be stated, and it had been stated, doubtless the result would have been different."

Upon reading this passage it seemed to me that it was my duty to admit the petition for review, and re-consider my order.

Accordingly I have re-considered my order, and after hearing what the plaintiff's pleader had to urge in support of his case, and after perusing and construing the order of the Civil Court appointing the Receiver, and the decree of the High Court in *H. H. M. Jíjoyiamba Bayi Saiba and another* v. *H. H. M. Kámákshi Bayi Saiba and* 12 *others*,[a] I have come to the conclusion that my order rejecting the plaint was a right and legally proper order, and that the plaint must be rejected under Section 32 of the Code of Civil Procedure, because the subject-matter of the plaint does not constitute a cause of action to the plaintiff, subject to the decision of the High Court upon the following case :—

The suit is brought to recover damages on account of the violation by the 1st defendant of a legal obligation incurred by the 1st defendant through making a convention with the 2nd defendant on the 20th August 1866. By the terms of that convention the 1st defendant was obliged to pay to the 2nd defendant a certain sum of money on or before a certain date. The suit is brought not by the 2nd defendant but by the plaintiff, as being the appointed " Receiver" of the Tanjore estate.

The following is a translation of the plaint :—" Under a Muchalka, dated the 20th August 1866, the 1st defendant rented for 3 faslis, from fasli 1275 to 1277, 16 mahs of Punjei and Swarnadáyam land of the Vadapáthi Padugai, in the Mokhása village of Sundara Perumál Covil, and fruit trees

(a) 3 M. H. C. R. 424.

1871. November 8. R. C. No. 39 of 1871.

belonging to the deceased Máhárája of Tanjore, and agreed to give an annual rent of Rs. 81-15-1, the sum due for fasli 1275 being payable on or before the 30th August 1866, and in default interest being chargeable at Rupee 1 per mensem. The Muchalka has been executed by the 1st defendant to the 2nd, the then manager appointed by Kámákshi Bayí Saiba. The 1st defendant accordingly enjoyed the land, but paid only part and not the whole of the rent due for fasli 1275, as hereinunder specified, viz.:—Balance due, Rs. 61-15-1. As the Muchalka has been executed on behalf of the estate of which I, as stated above, am the Receiver, I bring the suit to recover from the 1st defendant the above-mentioned amount with interest and costs. The Muchalka being in the name of the 2nd defendant he is also made a defendant."

According to the plaint the 2nd defendant was a mere 'name-lender' in the transaction evidenced by the instrument sued on, and lent his name as obligee because he was at the time "managing" the Tanjore estate. But according to the written statements made by the senior of the late Rája's widows, and of the 2nd defendant, respectively, put into the Tanjore Civil Court in the course of O. S. No. 16 of 1866, and reported at 3 M. H. C. R. 426, the 2nd defendant was duly adopted as the son of the late Rája on the 1st July 1863, and the whole property was shortly afterwards put in his possession, and he was in 1864 the only party entitled to the property, both under the Hindu Law and because the senior widow being the owner, if the pretender was not, had assigned to him all that was in her. And therefore it was as *owner* of the Tanjore estate, not as *manager*, that the 2nd defendant made the convention aforesaid with the 1st defendant. The following is a translation of the first part of the instrument sued on:—"Muchalka executed by Muthusámi Pillai to His Royal Highness Máhárája Rája Sri Sarab'hôji Sahib before Tiruvenkata Pillai, Agent. I, one of the 4 persons that rented the Punjei lands and fruit trees in the western portion of Vadapáthi Padugai in the village of Sundara Perumál Covil, under a Muchalka, dated the 17th August 1865, having undertaken to pay for my

share of the land (16 mahs) and fruit trees (18 in number) Rs. 81-2-3 and As. 12-10 respectively, for 3 faslis from the beginning of fasli 1275 to the end of 1277, and having accordingly cultivated the land and enjoyed it for fasli 1275, agree to pay the rent due for that fasli, namely, Rs. 81-15-1 to the karnam on or before the 30th August of fasli 1276, and obtain the printed katchats issued by the Palace authorities." 1871. *November 8.* *R. C. No. 30 of 1871.*

The rest of the instrument consists of numerous provisions, and contains nothing from which it can be pretended that the second defendant was dealing with the 1st defendant in any capacity other than that of absolute owner and possessor.

In execution of the decree passed in the suit above referred to, the Civil Court of Tanjore appointed the plaintiff "Receiver" of the Tanjore estate by the following instrument:—

Original Suit No. 16 *of* 1866.

"Whereas it has been shown to the satisfaction of the Court that the undermentioned property in dispute in the above suit is being wasted and misapplied by the 1st and 14th defendants, you are hereby appointed Receiver of the said property. You shall diligently and faithfully discharge the trust committed to you and act, in every respect, according to the instructions given you, and to the best of your judgment, for the preservation and improvement of the property, and for the interest of the parties concerned. You are hereby empowered to *collect* the rents and profits thereof, and to *apply and dispose* of the same in such manner as the Court shall, from time to time, direct. You shall *render a true and just account* of whatever may be *received* by you, and also quarterly accounts in abstract. You shall derive no personal advantage whatever, directly or indirectly, and you shall exercise the powers of *Receiver* until otherwise ordered by this Court."

By virtue of this instrument the plaintiff as "Receiver" took possession of the Tanjore estate, and proceeded to col-

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lect the rents and profits thereof, and to apply and dispose of the same.

On the 8th May 1868, the High Court passed a decree, on appeal from the decree passed in the suit above referred to, and thereby directed the permanent appointment of a "*Receiver and Manager*" of the whole of the property, and that "if practicable the Collector be continued as such Receiver and Manager." And the plaintiff appears to have acted thenceforth as such 'Receiver and Manager' accordingly.

By the same decree certain necessary powers were conferred on the plaintiff in the following terms :—"And the said Receiver and Manager is empowered and directed in accordance with the judgment of this Court and subject to the control of the Civil Court to do all acts and things necessary or proper for the preservation and beneficial management of both the immoveable and moveable property and the collecting of the rents, produce and profits of the same, including the appointments of all Agents and servants for those purposes : as also all proper acts and things for the purpose of affording to the said widows respectively a fair participation in the use and enjoyment of the moveable property. And he is further empowered to discontinue such parts of the present Palace establishment as are not required for the convenience or comfort of the said widows, or not suited to their condition and circumstances."

The Receiver and Manager was further empowered to allow certain sums to each of the widows out of the rents and profits, and to do certain other things.

On the 10th and 14th September 1868, respectively, the Civil Judge of Tanjore, in answer to letters from the Receiver and Manager, wrote two letters giving an extra-judicial opinion on certain matters, and declining to give any opinion on the doubtful point whether the Receiver and Manager was or was not empowered to continue proceedings commenced by and in the name of the Pretender, as the point would probably come before the Civil Court for decision on appeal.

Upon the foregoing facts I was of opinion—(1) That by virtue of the convention evidenced by the instrument sued on, a *jus in personam* as against the 1st defendant accrued to the 2nd defendant for his own proper benefit; (2) that that right was never relinquished by, transferred from, or extinguished in the 2nd defendant; (3) that the right owners of the Tanjore estate, collectively and individually, have had and have no *jus in personam* as against the 1st defendant by virtue of the convention evidenced by the instrument sued on, or otherwise, to oblige him to pay them money for the occupancy of lands in fasli 1275; and (4) that the plaintiff as 'Receiver,' or 'Receiver and Manager' of the Tanjore estate, is not empowered to bring suits generally and the present suit in particular. 1871. *November* 8. *R. C. No.* 39 *of* 1871.

The questions for the consideration of the High Court are—

(1.) Whether, assuming as a matter of fact that the 2nd defendant accepted on his own account and as owner of the Tanjore estate, and not as agent for another, the promise of the 1st defendant to pay money to the 2nd defendant as the hire of the lands specified in the plaint, and assuming that the 2nd defendant fulfilled the promise or promises which he made in return to the 1st defendant, a right did not accrue to the 2nd defendant, absolutely and in his individual capacity, to demand and enforce payment to himself by the 1st defendant of the sum promised.

(2.) Whether the decree of the High Court above mentioned has in effect extinguished, or transferred to another, or in any way affected the above right of the 2nd defendant.

(3.) Whether the right owners of the Tanjore estate can now treat the 2nd defendant as their agent, for the purpose of adopting as their own a pact entered into by the 2nd defendant whilst he was in adverse and exclusive possession of the Tanjore estate.

(4.) Whether the 'Receiver (and Manager)' of the Tanjore estate is empowered by the order of the Civil Court appointing him 'Receiver' and the decree of the High Court confirming and limiting his appointment as 'Receiver and

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Manager,' or by either the order or the decree, to sue and be sued, either with or without leave obtained from the Civil Court of Tanjore, in behalf of the right owners of the Tanjore estate.

(5.) Whether the plaintiff was empowered by the order and decree, or by either, to bring the present suit, being a suit not for the recovery of rent accruing due during the term of the duration of his office, but for the recovery of money due to the 2nd defendant before the 'Receiver and Manager' was appointed."

No counsel were instructed.

The Court delivered the following

JUDGMENT:—As regards the first question submitted in this case, it is quite clear that the 2nd defendant, having been held to possess no title to the property, could not afterwards maintain an action for the non-payment of the rent of a portion of such property due according to the terms of the Muchalka. The right to the property and the right to the rents payable by the tenants occupying portions of it are inseparable.

As to the other questions submitted, the decisions of this Court in *Small Cause Referred Case No.* 55 *of* 1869, and in *Regular Appeal No.* 93 *of* 1870, 6 M. H. C. Rep. 125, referred to by the learned Judge, are in point, and following those decisions we hold that the suit is maintainable by the Receiver to recover the fair rent payable for the use and occupation of the land under the Muchalka, which is good evidence of what is the fair amount of rent.

No question of agency arises in the case. The Receiver, representing the rightful owners of the estate, is empowered by his appointment under the decree of this Court to sue for the rents accrued and accruing due from the several tenants who have been holding portions of the property belonging all along to the persons who have been pronounced by the decree of this Court to be the rightful owners. But we are of opinion that the right of suit does not extend to recover any thing as interest on the rent due. These observations afford an answer to all the questions submitted.

Appellate Jurisdiction. (a)

Regular Appeals Nos. 83 *and* 89 *of* 1870.

SARAVANA TE'VAN and 2 others....*Appellants in No.* 83 (14*th*, 15*th and* 16*th Defendants*).

MUTTAYI AMMA'L, guardian of minor MUTTUVIRAPPA GAUNDAN, and another.............. *Respondents in No.* 83 *and Appellants in No.* 89 (*Plaintiffs*).

TIRUMALAI GAUNDAN and 10 others.............................. *Respondents in No.* 89 (1*st*, 9*th*, 11*th*, 12*th*, 14*th to* 18*th*, 22*nd*, *and* 24*th Defendants*).

It is the firmly settled rule of Hindu Law, resting upon the authority of the *Mitákshará* and repeated judicial decisions, that a managing co-parcener has not the capacity to alienate or charge the share of his minor co-parcener in immoveable ancestral property, except for the purpose of providing for some family need or the performance of an indispensable religious duty, or except the alienation or charge be for the benefit of the joint estate: and in every case to which the rule is applicable, the onus of showing, either by direct or presumptive proof, a *primâ facie* case in support of the existence of the condition necessary to give the legal capacity to make the disputed disposition, lies upon the party claiming to have acquired under it a title to the minor's share of the property. Upon the question of what is the amount of proof which the law renders necessary to discharge that burthen of proof.—*Held*, that where the dispute as to the validity of a sale or mortgage of family property is with the person to whom it was made, and the pecuniary consideration for it has not been advanced for the purpose of discharging an antecedent charge on the property or an old debt incurred by an ancestor; the case of the vendee or mortgagee, as regards the existence of a family need or sufficient beneficial purpose requiring the advance of the consideration money, must be established by positive proof. But that between a *bonâ fide* sale or mortgage for an advance made to pay off a pre-existing mortgage claim or an unsecured debt of an ancestor, and one not made for that purpose, there was this distinction to be observed, that the burthen of establishing by direct proof that such prior claim or debt was incurred for a proper family purpose is not cast upon the vendee or mortgagee. He is only required to show this presumptively. But to do so it is incumbent on him to give proof not only of the consideration for the sale or mortgage having been *bonâ fide* advanced in discharge of an antecedent debt, but also of an enquiry productive of results which warranted his reasonably believing that such debt was a family obligation and the sale or mortgage a prudent arrangement for its discharge.

REGULAR Appeals against the decision of F. M. Kindersley, the Acting Civil Judge of Coimbatore, in Original Suit No. 14 of 1868. 1871. *November* 17. *R. A. Nos.* 83 *&* 89 *of* 1870.

The suit was brought by the plaintiff Muttayi Ammál, as grandmother and guardian *ad litem* of her grandsons the minor sons of 1st defendant, to recover the shares due to the

(*a*) Present :—Scotland, C. J. and Holloway, J.

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said minors in the family property, the 1st defendant having wasted and illegally alienated much of the said property and endangered the interests of the minors.

The plaintiff only sued for a share in the immoveable property, the whole of which she alleged was the self-acquisition of Nallatambi Gaundan, grandfather of 1st defendant. She alleged that 1st defendant succeeded to a large amount of moveable property in 1858, almost the whole of which he had squandered. The other defendants were sued as setting up claims to various items of the property, as purchasers, mortgagees, &c., from 1st defendant, which titles plaintiff contended were not good against the minors.

The following is extracted from the judgment of the Civil Judge.—

"Now to consider the claims set up by the different defendants.

The 2nd defendant has now no claim, but held a decree in Original Suit No. 40 of 1866 against 1st defendant, which decree has been transferred to 22nd defendant. I will therefore begin with 22nd defendant's claim, which, moreover, is one of the most important in the case.

The 22nd defendant claims under two separate deeds, the first being a mortgage for Rupees 900 on the plaint property Nos. 8, 11 and 34, under Exhibit XX, dated 10th March 1868. This document is proved by the plaintiff's 2nd witness and the 20th witness for the defence: but there is no evidence as to what purpose the money was applied to, or why it was borrowed, except that 20th witness says 1st defendant when borrowing said he wanted it for the purpose of buying bullocks for his sugar press and cattle.

Now, I think that following the ruling in S. A. 75 of 1863, I M. H. C. R. 398, the 22nd defendant was bound to adduce some evidence to show that the debt was contracted *bonâ fide* and for the benefit of the family, since at the time of its being contracted the 1st defendant's sons were minors, and as regards this debt 22nd defendant has produced no such evidence. It must, therefore, be held that the mortgage deed XX does not bind the shares of the minor sons of 1st defendant.

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Next the 22nd defendant claims under XIX, a deed executed by 1st defendant on the 29th April 1868, whereby 1st defendant makes himself liable for Rupees 26,000, and places in 22nd defendant's possession the lands plaint Nos. 1 to 3, 14 to 18, 20 to 24, 26, 27, 29, 37 and 39, the agreement being that 22nd defendant should allow Rupees 1,500 per annum for the maintenance of the family and credit the rest of the income against the debt of Rupees 26,000, and that 22nd defendant should hold the lands for 10 years or until the debt was discharged.

The execution of this deed is proved. It purports to have been executed for Rupees 15,000 due to one Lalji Sett under the mortgage bond Exhibit XXIII; Rupees 3,000 and Rupees 700 due to 22nd defendant under XXV and XXIV; another Rupees 1,000 due to 22nd defendant, Rupees 3,033 due for the decree in Original Suit 40 of 1866, made over by the 2nd to 22nd defendant, and Rupees 3,267 cash then received: and the evidence proves that 1st defendant did receive only about Rupees 3,000 in cash, the balance going to discharge former liabilities.

We will then proceed to examine what these former liabilities were: and the first we will take is XXIII, which is a bond to one Lalji Sett for Rupees 15,000, dated 24th January 1865. The defendant's 17th witness deposes to this, and shows that out of the amount XXI, a mortgage to 22nd defendant for Rupees 5,000 under date 10th January 1864, was discharged; that a sum of Rupees 3,000 was paid to 9th defendant or his brother (apparently due under XXII, a mortgage to 9th defendant's brother for Rupees 5,000 under date 13th May 1864), and that the rest was due to Lalji Sett for monies formerly advanced, and Rupees 1,000 or 1,500 to cloth merchants for cloths bought at time of 1st defendant's son's marriage, who were then paid, and if we go still further back, we have the evidence of the 4th and 15th witnesses that XXI was executed for Rupees 2,000, or so, then due to 22nd defendant, and Rupees 500 paid to 15th witness for gold bought to make family jewels, and that 1st defendant said he had to pay people who had been working on the family house with the remainder. This document is dated

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January 1864, and the evidence of plaintiff's witnesses goes to show that at that time the family house was being rebuilt, that 1st defendant's son was married about that time, and the plaintiff's witnesses also admit that 1st defendant did make jewels for the women of his family. Why the amount of XXII was borrowed, there is no evidence to show.

In the same way the execution of XXIV and XXV is proved by the plaintiff's 5th witness and defendant's 4th, 15th and 26th witnesses. These documents are both dated 8th June 1865; and the evidence shows, I think, most satisfactorily, that the amount of XXV was expended in discharging a hundi held by one Karmaji Sett for the value of goods sent from Madras for the shop kept by 1st defendant: and this seems a most legitimate expenditure. What became of the consideration money of XXIV, there is nothing to show.

Then the 22nd defendant, as 26th witness, himself proves that the Rupees 1,000 mentioned in XIX as due to him, is the sum sent by him to Madras as requested in XLII, a telegram received by him from Nallatambi Gaundan, the elder of the two minors, and for which the said Nallatambi and the plaintiff gave the receipts XLIII and XLIV.

Lastly, the amount due under the decree in Original Suit No. 40 of 1866 is shown by the evidence of plaintiff's 2nd witness to have been borrowed to meet the expense of moving into the new house which 1st defendant had built; and such being the case, and plaintiff not being able to show any fraud whatever, it seems to me that the decree must bind the family.

I have gone thus fully into the origin of the former liabilities, to discharge which XIX was executed, in order that should my interpretation of the law be wrong, the Appellate Court may be able to dispose of the question more easily. But I think that a creditor seeking to enforce his claim against a family estate, even when some members are minors, is not bound to do more than show that the money he advanced was used for the benefit of the family. For instance, in the present case it is sufficient, in my opinion, for the 22nd defendant to show that the money advanced

by him was employed in paying off the decree in Original Suit No. 40 of 1866, which was then standing against the family estate, and it is not necessary for him to prove that that decree is binding on the family. He having once proved that his money was applied to discharge liabilities then due by the family, it is for the plaintiff to show that the family was not bound by those liabilities. The same argument applies to debt XXIII. It was a debt then existing against the family, and it is sufficient for 22nd defendant to prove, as he has done, that the debt was actually existing and was actually discharged. Otherwise it is difficult to say where a creditor against a family estate would be able to stop in proving the necessity of debts incurred, for if in the present case, 22nd defendant has to prove the necessity and *bona fides* of XXIII, he must also prove the necessity and *bona fides* of XXI and XXII, and then again the necessity and *bona fides* of any debts discharged by them, and so on *ad infinitum*. Of course, the creditor must show that the debts are not fictitious and that they were actually discharged with the money lent; and it would be open to the members of the family who sought not to be bound by the subsequent debt to show that the former liabilities were fictitious, or from any cause were not binding on them: but in the present case there is no question of the genuineness of the cancelled liabilities (at least those evidenced in writing), and plaintiff has not, in my opinion, shown cause why they should not bind the minors.

There still remains a sum of Rupees 3,267 received by 1st defendant in cash at the time of execution of XIX....But there is no actual evidence as to how this money was spent.

I think then that as regards XIX, the minors cannot be considered bound for this sum of Rupees 3,267, or for the Rupees 700 said to have been paid in discharge of XXIV, for the arguments in para. 43 do not apply to this prior debt, seeing that it is a debt due to the same creditor.

But the minor's shares are, I think, liable for the remainder of XIX, which, I think, has been sufficiently shown to have been incurred *bonâ fide* and for the benefit of the

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family....There is no reason that I can see to suppose that as far as 22nd defendant is concerned, the transaction was made otherwise than with perfect good faith and with a due regard to the interests of the family as far as it was possible to regard them. At the same time I think I am bound by the ruling in *Special Appeal No.* 75 *of* 1863, I, M. H. C. R. 398, to disallow the claim against the minors except when there is some evidence not only as to the *bona fides,* but also as to the necessity of the debt incurred; and it is on this ground alone that I hold the minors are not liable for the amounts mentioned in para. 45."

The Civil Judge then proceeded in like manner to consider the validity or otherwise of the other claims preferred by the defendants, adopting, with regard to the burthen of proof in each case, the interpretation of the law as above laid down by him.

He then continued:—"The plaintiff has sought to show that there could not have been any necessity for alienating and encumbering the property; that 1st defendant succeeded on his father's death, some 12 years ago, to several thousand Rupees worth of moveable property and to an unencumbered estate yielding about Rupees 5,000 a year, clear income. But I do not think the Court is bound to see how the 1st defendant has managed the estate since he came into possession. I mean to say that the Court is not bound to see this as against the creditors on the estate, though mismanagement on the part of 1st defendant would be ground for giving the minors their shares on partition. Otherwise an inquiry of this kind might be extended back for years and years, and the managing member be called on to account for every anna he had received. It is presumed that the management was for the joint interests of the family, and though the managing member may have spent every anna of the income, as long as he does not encumber the estate, the expenditure will be presumed to have been equally for all the members of the family. What the Court has to consider is the state of the family at the time the alienations or encumbrances sought to be set aside were made.

And here we find from the evidence of plaintiff's witnesses that within a very few years, and precisely during the time when the various debts were incurred, there were extraordinary expenses falling on the family....Then if we look to the accounts...it would seem that the family expenditure as a rule very nearly equalled the income, and therefore that any extraordinary expenses would have to be met by borrowing money......

I have little hesitation in saying that the present suit has been got up with the sanction and knowledge of 1st defendant. The evidence leaves on my mind clearly the impression that such is the case, and that plaintiff, supplemental plaintiff and 1st defendant have all hit upon this suit simply as a means for getting something out of the fire. But this conviction is not enough to warrant a dismissal of the suit, since it is clear that when the alienations and encumbrances were made, 1st defendant's sons were minors, and could not have been consenting parties to the various transactions.

Of course it is the duty of the Courts to protect the interests of minors who cannot protect themselves, but at the same time it is the duty of the Courts to see that the fact of one member being a minor is not made use of to the injury of creditors who have entered into *bonâ fide* contracts with the head of a family, the only person competent at the time to enter into those contracts, and there can be no doubt that in many instances now it is a regular plan for a managing member of a family, after having incurred debts, to set up some third party to sue as guardian of some minors, so as to recover a portion of those debts: and such I have little doubt is the case in the present suit......

There is one question—whether under the circumstances a partition should be decreed, and I think on the whole it should. Though in most instances I have found the 1st defendant's acts good against the minors, yet it is evident that he is not a wise or prudent manager of the estate, and that it would be for the interests of the minors (one of whom has now attained majority) that a partition should take place.

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It is therefore decreed that plaintiff and supplemental plaintiff's claim to plaint Nos. 7, 9, 36 and 38 from the 9th, 11th, 12th, 17th, and 18th defendants be dismissed; that they be declared entitled to a two-third share in No. 39, recoverable on 4th defendant's claim to maintenance ceasing or being satisfied; to a two-third share in land No. 2, recoverable on payment to 23rd and 28th defendants of the mortgage claim Rupees 2,000; to a two-third share in plaint Nos. 1 to 3, 14 to 18, 20 to 24, 26, 27, 29, 37 and 39, the same being liable under XIX for Rupees 22,033 as against plaintiffs; and to two-thirds of Nos. 1, 13, 15, 16, 18, 27, 37 and 39, the same being liable for the decree in Original Suit No. 15 of 1867 held by 24th defendant; that plaintiffs do recover two-sixths of plaint No. 28 from 14th defendant, of No. 30 from 15th defendant, and of Nos. 31, 32, 33 and 41 from 16th defendant, and two-thirds of the rest of the plaint property.

The plaintiffs must pay the costs of the 2nd, 20th and 21st defendants, who have been unnecessarily made parties, and of the 9th, 11th, 12th, 17th and 18th defendants, against whom their claim has been dismissed: and of the 23rd, 28th and 3rd defendants, whose claims have been upheld in toto. As regards the other defendants costs will be proportionate to the amounts allowed and disallowed."

Against this decree 14th, 15th and 16th defendants appealed in No. 83, and plaintiffs in No. 89.

Johnstone for the appellants in No. 83, and the 5th, 6th, 7th, 10th and 11th respondents in No. 89.

Handley for the respondents in No. 83, and the appellants in No. 89.

Gordon and *Ráma Rau*, for the appellants in No. 89.

Gould for the 10th and *Gurumurti A'yyar* for the 8th respondent in No. 89.

The Court delivered the following judgments:—

SCOTLAND, C. J.—This is a suit instituted on behalf of the minor sons of the 1st defendant (one of whom has come of full age since the date of the suit) to invalidate several sales and mortgages made by the 1st defendant of the portions of the immoveable family property held by the other defendants, and to enforce a partition of the plaintiffs' shares

on the ground of serious injury to their interests already sustained by the 1st defendant's dissipation of a large part of the property to which he succeeded, and likely to be further caused. The Civil Court has decreed a partition of the plaintiffs' shares, but only as to some of the lands sold and mortgaged by the 1st defendant to the other defendants. And in the present cross appeals brought by the plaintiffs and the 14th, 15th and 16th defendants, the questions raised for determination are, whether the decree is wrong with respect to all or any of the sales or mortgages relied upon by the defendants who are before this Court either as appellants or respondents. It will be necessary to express my conclusions separately as to each defendant's claim. But there is one fundamental point the consideration of which is alike essential to the determination of all the claims, and with that I shall first deal.

It is the firmly settled rule of law, resting upon the authority of the *Mitákshará* and repeated judicial decisions, that a managing co-parcener has not the capacity to alienate or charge the share of his minor co-parcener in immoveable ancestral property, except for the purpose of providing for some family need or the performance of an indispensable religious duty, or except the alienation or charge be for the benefit of the joint estate. See the case *Hunoomanpersaud Panday* v. *Mussumat Koonweree*, 6 Moo. I. A. 393. And there is no doubt that in every case to which the rule is applicable, the onus of showing, either by direct or presumptive proof, a *primâ facie* case in support of the existence of the condition necessary to give the legal capacity to make the disputed disposition, lies upon the party claiming to have acquired under it a title to the minor's share of the property. In the application of this law to the present case, the point which has called for a little consideration is the amount of proof which the law renders necessary to discharge that burthen of proof.

The governing authority on the point is the judgment of the Privy Council in *Hunoomanpersaud Panday* v. *Mussumat Koonweree*, and the positions which I have considered to be settled by that judgment are these :—That where

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the dispute as to the validity of a sale or mortgage of family property is with the person to whom it was made, and the pecuniary consideration for it had not been advanced for the purpose of discharging an antecedent charge on the property, or an old debt incurred by an ancestor; the case of the vendee or mortgagee, as regards the existence of a family need or sufficient beneficial purpose requiring the advance of the consideration money, must be established by positive proof. But that where the consideration money has been advanced in good faith for the purpose of discharging an antecedent charge on the property, or an unsecured debt of an ancestor, it is enough for the vendee or mortgagee to establish a *primâ facie* case as to the charge having been made, or the debt incurred for a proper purpose, by presumptive proof; that is by proof of the existence of such a charge or debt; of its having appeared on reasonable enquiry to be an unquestioned burthen on the property, or liability from which it was prudent to relieve the family, and of the advance having been made in good faith for its discharge.

With reference to such a case it is observed in the judgment.—" Their Lordships think that the lender is bound to enquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the Manager is acting in the particular instance for the benefit of the estate. But they think that if he does so enquire, and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and they do not think that, under such circumstances, he is bound to see to the application of the money."

The decision in the more recent case before the Privy Council, *Cavaly Vencata Narrainapah* v. *The Collector of Masulipatam*, 11 Moo. I. A. 619, cited by the learned Counsel for the plaintiff, does not, I think, materially assist in the determination of the present case. There mortgage charges created by a widow upon her husband's property after she had succeeded to it, were sought to be invalidated by the Government claiming the property by escheat for failure of heirs of the husband; and the point determined

was the sufficiency of the evidence to prove inferentially that at the date of the last mortgage made by the widow, a sum equal to the amount secured had remained due in respect of past advances which she had received to enable her to make payments towards the discharge of her husband's debts and to meet other demands.

Evidence as to the purpose for which her husband's debts had been incurred was not, it is true, considered necessary to establish the capacity of the widow to make the mortgage. But as there can, I apprehend, be no doubt that proof of that is required only when a sale or mortgage of family property for advances to pay off outstanding debts is impeached by an heir who is a co-parcener, the judgment has not, in that respect, any authoritative bearing on the present case. It does, however, lay down a further rule as to the burthen of proof which is of general applicability:— That where antecedent debts are shown to have existed, it is not incumbent on a mortgagee to prove by positive evidence that they were undischarged at the date of the mortgage securing the advances, unless circumstances should appear which raise the probability of their having been satisfied. He is not debarred the benefit of the ordinary rule throwing the onus of proof on the person affirming the fact of payment.

Following these rules, I think that between a *bona fide* sale or mortgage for an advance made to pay off a pre-existing mortgage claim or an unsecured debt of an ancestor, and one not made for that purpose, there is this distinction to be observed; that the burthen of establishing by direct proof that such prior claim or debt was incurred for a proper family purpose is not cast upon the vendee or mortgagee. He is only required to show this presumptively. But to do so it is incumbent on him to prove more than the Court below decided to be necessary. He must give proof not only of the consideration for the sale or mortgage having been *bona fide* advanced in discharge of an antecedent debt, but also of an enquiry productive of results which warranted his reasonably believing that such debt was a family obli-

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gation, and the sale, or mortgage, a prudent arrangement for its discharge.

I have, next, to consider the effect of the application of these settled Rules to the facts relating to each of the claims in dispute, which all the parties to the appeals admit to be fully and satisfactorily found in the judgment of the Court below. In every instance in which the Civil Judge has decided against the validity of the sales and mortgages to the defendants who are parties to the appeals, as respects the portions of their advances not required to pay off debts previously incurred, his decision appears to be clearly right. I am also of opinion that his conclusions are maintainable in the instances in which he has found in favor of their validity, as respects other advances, either wholly or in part representing newly created debts, except three, namely, the sales to the 18th defendant by the document Exhibit XVIII, and to the 9th defendant by the document Exhibit XXVIII, and to 11th and 12th defendants under Exhibits I and II. The 18th defendant appears to have proved really no case as to the purpose for which the sale had been effected. No consideration, therefore, should have been given to the absence of evidence on the part of the plaintiff. And the evidence adduced by the 9th defendant fails, I think, to afford *primâ facie* proof of any pressing need for the application of the purchase money to the support of the family. It is left quite probable that the income derived by the 1st defendant from the family property was sufficient to meet the expenditure for every family purpose. The same observations apply to the 11th and 12th defendants' claim.

Then as to the claims of the respondents, as respects such portions of their advances as went to pay off pre-existing mortgage charges and other debts, I am of opinion that the conclusions of the Civil Court ought to be upheld in regard to the portions of the advance secured by the mortgage (Exhibit XIX) found, in paragraph 39 of the Civil Court's Judgment, to have been required to pay the price of cloths purchased at the marriage of the 1st defendant's son, and the amount of the hundi (Rupees 3,000) given for the value of

goods supplied to the shop kept by 1st defendant, and to satisfy the debts under the decrees in Original Suits Nos. 40 of 1866 and 15 of 1867, for the loan to defray the expenses of the marriage of the supplemental plaintiff and for the amount of the purchase money recovered under the agreement, Exhibit XL. The facts applicable to those antecedent debts do, I think, make out a *primâ facie* case sufficient to sustain the burthen of proof both as to the existence of a family purpose and a reasonable necessity for incurring the liabilities to meet such purpose.

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But with respect to the right of the respondents to the other portions of the advances applied to the discharge of debts then outstanding, the decree of the Civil Court is not, I think, sustainable. The evidence, it appears, proved nothing beyond the fact of the existence of those debts and their discharge out of the advances: and upon the sufficiency of that proof the Civil Judge has entirely based his determination in favor of the respondent's claims. In so deciding, he has certainly failed to give effect to the Rule relating to the burthen of proof imposed for the protection of coparceners who are minors. Support for the presumption that the prior debts had been necessarily incurred for family purposes was wholly wanting. Very slight, indeed, would be the protection secured to minors, if proof of the bare fact of the discharge of pre-existing debts were all that the law required to establish a *primâ facie* case. If that were so, creditors and purchasers would be enabled to render binding on minors, mortgages and sales for advances to pay off debts, which at the time they knew or had reason to believe had not been incurred for any proper family purpose. But, as I have already expressed, nothing short of proof of circumstances ascertained by due enquiry, from which the contracting of the debts for a family purpose might in good faith be honestly presumed, can suffice to sustain the onus of proof which the law casts upon the creditor or purchaser. He must show that he did what a prudent man might in the circumstances be reasonably expected to have done, in order to inform himself as to the purpose for which the debts had been incurred.

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Being of this opinion, it becomes necessary to consider the liability of the 22nd defendant under the stipulation in the deed, Exhibit XIX, for the annual payment of Rs. 1,500 for the maintenance of the family. As there is no doubt he knew that the 1st defendant had minor sons, and as it does not appear that he was, in any way, misled by the 1st defendant, I think that he should not be placed in a better position than he would have held as mortgagee of only the 1st defendant's one-third share of the lands mortgaged, but should be declared entitled to hold the lands discharged of the liability to pay more than one-third of the stipulated allowance of Rs. 1,500, and ordered to pay that amount to the 1st defendant for his support.

For these reasons I am of opinion that so much of the Lower Court's decree as relates to the lands described in the Plaint by the Nos. 1, 2, 3, 7, 9, 13, 14, 15, 16, 17, 18, 20 to 24, 26, 27, 28, 29 to 33, 37, 38, 39 and 41, should be reversed. That it should be declared that the mortgage to the 22nd defendant is binding on the plaintiffs for the portion of the advance which it was made to secure, equal to the aggregate amount of the antecedent debts due for cloths purchased at the marriage of one of the 1st defendant's sons and for the discharge of the hundi given for the supply of shop goods, and for the amount of the decree in Original Suit No. 40 of 1866, and that the 22nd defendant is liable to pay annually from the date of the suit, to the 1st defendant, one-third of the amount stipulated to be paid for maintenance in the deed Exhibit XIX. That the mortgage lien under the decree in Original Suit No. 15 of 1867 is binding on the plaintiffs for the portion of the amount due under it, equal to the aggregate amount of the debts due for the expenses of the 1st plaintiff's marriage and jewels and shop goods (Rs. 1,500), and on account of the purchase money of the shop stated in the agreement Exhibit XL. That the sales effected by the deeds, Exhibits IV, VII and X, are binding on the plaintiffs for the portion of the purchase money which was applied to the discharge of the debt due under the mortgage deed Exhibit V. And in other respects I think that the decree should be affirmed. The respondents should, I think,

be ordered to pay the appellant's costs throughout, proportionate to the amount of their claims disallowed by the reversal of the decree, and should bear their own costs. Regular Appeal 83 will be dismissed with costs.

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Holloway, J.—The suit was for ascertainment and delivery to the next friend of minors, on behalf of the minors, of their share of the family property, on the ground of unauthorized alienations of that property, and for the setting aside, so far as the shares of the minors are concerned, those alienations.

Mr. Handley, for the plaintiffs, appealed on the ground that no one of the transactions was such as to come within the principle of the Hindu Law as expounded in the *Mitákshará*, Cap. I, Sec. I, clauses 28 and 29. Undoubtedly, the language of those passages points to an urgent necessity affecting the whole family. It must be remembered that the minors are at their birth joint owners of the property according to our theory of the Hindu Law, and that no inference can usefully be drawn from cases, and especially Bengal Cases, as to the defeasance of alienations by a widow, at the suit of the next heirs. In the *Vishnapettah Case* (11 Moo. 619) the party disputing the alienation was the Crown entitled by escheat, yet the rule was held, distinctly, to be that it lay upon the creditor to prove that the money was lent for purposes for which the estate could properly be charged, and the burden was sustained by showing a debt binding the husband at the devolution of the estate upon the widow, with the absence of evidence of discharge, or of a reasonable probability that it had been discharged; but, in fact, the probability on all the circumstances of the case was the other way. Here, it must be remembered again that the deceased Zamindár could, from the absence of male heirs, charge the estate at his will, according to the recent authorities, and no evidence could, therefore, be required of the validity of the debts incurred by him. I was right, therefore, in saying that the decided cases had by no means modified the rule of Hindu Law to the extent which was attempted in the *Salem case.* He who attempts, by the aid of extraneous circumstances, to take from one member of a family an interest larger than

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that member is primarily capable of conveying, must prove that the money paid for that interest was lent and expended for purposes of necessity, not of the individual borrower, but of the family whose property he is professing to charge.

I am unable, therefore, to agree with the law laid down by the Civil Judge in para. 43 of his judgment. It is not enough, in my opinion, to produce a decree, or a mortgage, or a bond, and show that the money was lent for the discharge of the sums due under one of them. It is necessary to go further and show that those debts themselves were such as to be properly binding upon those who have not personally incurred them. If it were otherwise, the debtor, having first borrowed money for his own purposes and mortgaged family lands for the satisfaction of the debt, would be able, by the simple process of admitting the debt, to render the invalid unimpeachable; or, by discharging with borrowed money a previous bond in itself wholly invalid against co-parceners, would bind them.

It is manifest that the rule of law would be simply illusory if it could be so defeated. The argument that such loans prevent the family estate from being sold in satisfaction of a mortgage and are, therefore, for a family necessity, is a mere fallacy. The sale could only touch the right, title and interest of the mortgagor, and this is merely to his own share, so that the shares of the minor co-parceners would still be recoverable on their simple legal title, unless the indispensable evidence was given that the debt was incurred for a necessity which could properly be held to bind them. Whether the money borrowed was the ground of creation of the original charge, or whether it was for the discharge of one previously created, can neither in law nor logic make the slightest difference. He who obtains from *one*, by mortgage or sale, land to which *three* are entitled, primarily takes the share of the author of the transaction only, and if he desires to take more, it is upon him to see that he lends his money in circumstances justifying the extension of the claim beyond its natural legal scope, and to prove as against those legally entitled that he has done so. This is the plain and reasonable rule of law, and I am aware of no authority in

opposition to it. It only remains to apply it to the findings of the Civil Judge upon the facts of this case. It was admitted on both sides that the findings upon the evidence must be taken as correct. They were not impeached by either party in appeal.

The 22nd defendant is the assignee of a decree obtained by 2nd defendant against the 1st. The finding on Exhibit XX is strictly in accordance with the rule. No evidence and no charge.

Document XIX, is a mortgage of certain parcels of land for Rupees 26,000, made up of Rupees 3,000 received in cash and the remainder expended in discharge of former liabilities.

The first of these is the bond of Lal Sett for rupees 15,000 (XXIII). It seems to me that of this sum only 1,500 can be allowed as a family expenditure on cloths at the son's marriage. There is absolutely no evidence of any family necessity for the rest of the amount. The sum under XXV should, I think, be allowed for the shop debt, because it seems impossible to say without evidence that the shop was not a reasonable speculation which might have been to the benefit of the family.

I cannot see that the minor, incapable of acting, can have given any additional strength to the claim under XIX by affixing his signature, and there seems to be no evidence of family necessity. I would disallow it.

With some doubt I think that the sum of Rupees 3,033 on the decree must be allowed, not on the ground that the minors have proved no fraud, but on the ground that although perhaps grossly extravagant, the ceremonies on going into the new house may, within the religious views of the Hindu Law, be regarded as a family need. The sum under XXI must be disallowed, because there is no evidence whatever of the purpose of the debt for the discharge of which the sums borrowed were employed.

It appears to me that the mortgage of the 22nd defendant is only a subsisting charge upon the whole family property for the sums here stated. The mortgage will, of course, subsist against the 1st defendant's share for the whole amount,

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and the 22nd defendant is entitled to be relieved from his stipulation of paying Rupees 1,500 per annum for the subsistence of the family and to convert his charge into a simple mortgage. Since writing the above I have seen the observations of the Chief Justice. I do not dissent from compelling the 1st defendant, so long as the mortgage subsists, to pay one-third of the maintenance money. I felt great difficulty in saying this, because this does not represent precisely the proportion which the benefit obtained bears to those for which he stipulated. He has succeeded in charging rather more than the one-third share, and I doubted, further, whether it would be possible to split his obligation, which was to pay for the support of the whole family, and convert it into one to pay an aliquot part to one member.

On this point the decree will, therefore, be for partition of two-thirds on payment of two-thirds of the sum allowed against the family, the remainder of the charge being declared to subsist as a valid charge upon the one-third share, subject to the obligation to pay 500 rupees to the 1st defendant.

I quite agree to the disallowance of the sum in para. 44.

It is clear that the sums represented by 33 to 36 cannot, on the principles stated, be a charge upon the minor's shares. I have already dealt with the argument as to proof being dispensed with if the liability is a prior one. Here we have the usual ex-parte decree, a nice security for the protection of a co-parcener's interests. The sum of Rupees 1,500 may by some stretch of principle be allowed against the minors. I think that the sum of Rupees 8,652-14-0 for the shop must be allowed. It is not possible to say, upon any findings before us, that the entry into business was mere profligate waste of the family estate, or that there did not exist reasonable expectation of increasing it. The disallowance in para. 55 is clearly right.

The expenditure upon the family in para. 56 is not in my opinion enough. If it were otherwise, all borrowed money might be expended upon legitimate family purposes, and the produce of the family property upon illicit expendi-

ture. Evidence of expending is not enough, there must be evidence of necessity.

I make the same observation as to the sum in para. 57.

The disallowance in para. 58 is, in my opinion, right: the permanent improvements, if any, may become a question in execution.

With some hesitation I would assent to the finding in 61.

The consent of the plaintiff can have no bearing upon the case, and I would disallow the transaction in 62. The decision in 63 is of course right.

I quite agree that creditors are not to be necessarily affected by the state of the family, or the monstrous improvidence of the managing member; but, if they seek to get more than the rule of law will give them, they must make out distinctly the grounds on which B. and C. are to be charged on the transactions of A. Surely there is no hardship in this, the relaxation of the rule of law permits them to come upon the contractor's share, and it is upon them to see that they do not lend more than that share can satisfy. It is very likely that the managing member is now in collusion with the minors, but the question is simply one of law, and the other side to the picture is that money lenders exact inordinate interest because of the assumed insecurity of the title, and then, by virtue of the favour shown to creditors, seek to get a security in every respect perfect and to enforce the obligation against those with whom they have never contracted.

With the findings in 71 and 72 I would not interfere.

I am of opinion that the appeal in 83 should be dismissed with costs; I think that the plaintiffs should have their costs, for they have substantially succeeded; and they should certainly not be compelled to pay costs, for they had a perfect right to challenge all these alienations. The assumed hardship of applying the plain rule of Hindu Law, I am wholly unable to see. Every man in the country knows well that it is the rule, and there is no decision whatever, either of this Court or of the Judicial Committee, impeaching it. On the

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contrary it was upheld in a much stronger case, in which it was no case of charging the estate as against a joint tenant, but a case of charging the Crown coming in by escheat. Uncertainty arises from feeling in particular cases being allowed to tamper with the plain rules of law, and I consider that in this matter they are perfectly plain and should be upheld. The result will be that creditors will have to do what in England and all other countries they are bound to do, look to the security. Nothing can justify the charging of minors but a pressing and proved necessity of theirs. An artificial necessity of the major member will not do.

Appellate Jurisdiction. (a)

Special Appeal No. 311 *of* 1871.

RA'CHURI VENKUBAIYAMMA......*Special Appellant.*

GUDURU RA'MANNA PANTULU and another. ... ... } *Special Respondents.*

As Act XIX of 1843 has been repealed and the new Registration Act (VIII of 1871) contains no provision for the priority of registered deeds over any others, save in the cases of optional registration, the ordinary rule applies that the prior conveyance must prevail.

THIS was a Special Appeal against the decision of F. C. Carr, the Acting Civil Judge of Vizagapatam, in Regular Appeal No. 92 of 1869, reversing the decree of the Court of the District Munsif of Vizianagram in Original Suit No. 66 of 1868. 1871. *October* 30. *S. A. No.* 311 *of* 1871.

The suit was brought to recover a house and ground said to have been sold by the 1st defendant to the plaintiffs under a registered deed of sale (A), dated October 4th, 1867.

The 1st defendant admitted the execution of the deed of sale, A, but pleaded that it was void, as she had not received the purchase money from the plaintiffs.

The 2nd defendant denied the plaintiffs' claim, and on her own behalf preferred a claim to the property, under a deed of sale (Exhibit 2) dated February 13th, 1863, under which deed she alleged that she had been and was in possession, and that the plaintiffs had never been in possession.

The Munsif, finding that Exhibit No. 2 was satisfactorily proved, and that it was prior to the deed Exhibit A, dismissed the plaintiffs' claim, giving a decree in favor of the 2nd defendant.

From this decree the plaintiffs appealed.

The Civil Judge, reversing the decree of the Munsif said,—

"The decree of the Lower Court cannot be upheld. The plaintiffs' Exhibit A is proved to have been duly exe-

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cuted, and it was taken to the Registrar's Office and there duly registered, the 1st defendant admitting that she had received from the plaintiffs the full amount specified. This disposes of the 1st defendant's plea that the sale was void by reason of her not having received the purchase-money.

Then as between Exhibit A and Exhibit 2, the former, being a duly registered deed of sale, must, in accordance with the terms of Section 2, Act XIX of 1843, take preference of the latter which is not registered, and this principle has been fully recognized in *Special Appeal No.* 46 *of* 1866, quoted at page 89, Volume III, High Court Reports."

From this decision the 2nd defendant preferred a special appeal.

Anandacharlu for the special appellant, the 2nd defendant.

Johnstone for the special respondents, the plaintiffs.

The Court delivered the following

JUDGMENT:—In this case the Act of 1843 has been entirely repealed, and the new Registration Act contains no provision for the priority of registered deeds over any others, save in the cases of optional registration. This being so, the ordinary rule applies that the prior conveyance must prevail, and the decree of the Civil Judge must be reversed and that of the Munsif restored with costs.

Appeal allowed.

Appellate Jurisdiction. (a)

Regular Appeal No. 34 *of* 1871.

JAMES FISCHER... ... ...*Appellant.*

ROBERT FISCHER ... ...*Respondent.*

Plaintiff sued to recover Rupees 21,650-5-1, balance of principal and interest due. He alleged in his plaint that, between the 16th February and 23rd July 1867, he paid, at the request of defendant's father, the late G. F. Fischer, Rupees 25,000 on account of the Shivaganga zamindárí; that the defendant having assumed the management of the zamindárí under an assignment from his father, gave plaintiff a receipt for the said sum of Rupees 25,000 under date the 7th August 1867; that in October and December 1867, defendant paid the sums of Rupees 5,000 and Rupees 3,000 respectively, in part liquidation of the debt, but since 20th December 1867 refused any further payment. Defendant answered that this debt due by the late G. F. Fischer had been validly released by the terms of an assignment, dated 29th July 1871; that the receipt given by defendant was a mere acknowledgment of the payment of Rupees 25,000 by the plaintiff to the late G. F. Fischer and imposed no obligation on defendant to pay the said amount; that there was no consideration for defendant's promise to pay Rupees 25,000; that when defendant executed the receipt he was not aware of the effect of the release, and that the part payments were made under a mistaken idea of liability. At the hearing it was not disputed that a release was executed, and that this claim was embodied and was intended to be embodied in that written release, but it was attempted to set up a contemporaneous oral agreement, leaving this claim as a subsisting demand. The Civil Judge dismissed the suit, holding that this oral evidence could not be adduced to contradict the written release. *Held*, on Regular Appeal, that the Civil Judge was right. The principle is—Is the matter of the contemporaneous oral agreement so outside the scope of the written one that they can logically subsist together, so that the oral shall neither contradict nor modify the written?

In the present case, to set up an oral agreement that the sum released should, in fact, be paid, is to deal with an object already embodied in the written agreement in a manner antagonistic to its provisions. It is not only to vary what the words do mean, but what they were intended to mean. The subsequent receipt for the money did not create a debt, for the release had already extinguished it.

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THIS was a Regular Appeal against the decree of J. D. Goldingham, the Civil Judge of Madura, in Original Suit No. 16 of 1870.

The plaintiff sought to recover from the defendant Rupees 21,650-5-1, balance of principal and interest due.

The plaint set forth that between 16th February and 23rd July 1867, plaintiff paid at the request of the defendant's father, the late G. F. Fischer, Rupees 25,000 on account of the kist due on the zamindárí of Shivaganga; that the

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defendant having assumed the management of the zamindári under an assignment from his father, delivered to plaintiff a receipt under date the 7th August 1867, in acknowledgment of the said sum of Rupees 25,000; that in October and December 1867, defendant paid Rupees 5,000 and Rs. 3,000 respectively, in part liquidation of the debt, and since 20th December 1867 refused any further payment. Hence this suit.

In his written statement the defendant pleaded that the late G. F. Fischer was released from all obligations to repay the sum of Rupees 25,000 by the terms of an assignment (Exhibit I) dated 29th July 1867; that the receipt A, given by defendant, was a mere acknowledgment of the payment of Rupees 25,000 by the plaintiff to the late G. F. Fischer, and imposed no obligation on defendant to pay the said amount; that there was no consideration to support defendant's promise to pay the sum of Rupees 25,000; that when the defendant executed the receipt A he was not aware of the effect of the release contained in the assignment, defendant's Exhibit I; that the part payments were made under a mistaken idea of liability, and that defendant resisted payment as soon as he became aware of it; that the amount of Rupees 25,000 was not a loan to the zamindárí, nor was it a charge upon the estate; that defendant had no assignment of the zamindárí, and had no interest in it until the bequeathal thereof by the late G. F. Fischer, under his will, dated 29th July 1867, which began to take effect from the 28th August 1867, and that the will imposed no liability on defendant to pay the amount sued for.

The following issues were settled:—

Whether the release had the effect of extinguishing the defendant's liability.

Whether when defendant signed the receipt A and made the part payments alluded to, he was unaware of the legal effect of the deed Exhibit I, and acted under a mistaken idea of his liability.

Whether, assuming the debt to be due from the estate of the late G. F. Fischer, defendant is liable for the debt in question, and if so, to what extent.

The judgment of the Civil Judge contained the following:— 1871. October 30. R. A. No. 34 of 1871.

"Plaintiff claims to recover from defendant the unliquidated portion of a sum of 25,000 Rupees which he advanced to defendant's father between 16th February and 23rd July 1867, and which defendant has acknowledged by a receipt, dated 7th August 1867; defendant's plea is in substance that the debt had no legal existence, because plaintiff, subsequent to the date of the said loan, by deed, dated 29th July 1867 (Exhibit I), released his father from all liabilities which he had incurred towards him,

The parties to this suit are close relations, and the admitted facts are these:—James Fischer, the plaintiff, married a sister of the defendant Robert, the son of the late George Frederick Fischer. Plaintiff is also the latter's nephew, and he is thus both first cousin and brother-in-law of the defendant. When George Frederick Fischer was advancing in years, and, as it turned out, a month before his death, he made by two written instruments a distribution of his property, which seems to have been very extensive, assigning certain interests to plaintiff, certain to his other daughter Mrs. Foulkes, and the remainder which was specified he bequeathed, by a will which bears the same date, to his son Robert, the defendant, whom he also appointed residuary legatee. The date on which the distribution was effected was the 29th July 1867, and in para. 2 of the deed (Exhibit I), in virtue of which plaintiff took possession of his estate, is the release on which the defendant relies. It runs thus,—"that the said James Fischer on his part hereby grants to the said George Frederick Fischer as head of the firm of Fischer and Co. of Salem, and personally also, a full release *from all claims whatsoever* which the said James Fischer has or may have up to the 31st July 1867 against the said George Frederick Fischer."

Now there is only one construction which the English language admits of that can be put upon the wording of this covenant, and that is, that, up to the date indicated, all existing liabilities were to be extinguished. James Fischer,

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plaintiff's 3rd witness, in his deposition virtually admits this much, and he assigns as the reason, that they found the accounts so intricate that it was impossible to unravel them. Such being the case, on what ground then does plaintiff seek to attach to defendant a liability on account of this 25,000 Rupees ? He states in his evidence that he demurred signing the deed, because the amount of this loan to his uncle was borrowed on the security of a lac of Rupees, or thereabouts, which he had in Company's paper in the Oriental Bank, and which in para. 1 of the deed he covenanted to settle upon his three daughters, a heavy penalty being attached in case of non-fulfilment on his part, and that in consequence of this demur of his, his uncle promised to make the above sum good to him. I am not prepared to say this is not true, but it is not the policy of the law to allow transactions of this nature to be ripped up after they have been brought to a close in the most solemn manner that human dealing suggests, nor can it take the case out of the well known and long established rule that parol evidence is not admissible to prove a contemporaneous oral agreement, when the effect of that evidence is directly to contradict the terms of the written agreement."

The Civil Judge then further commented upon the evidence and continued,—

"Now what is the state of things that these letters disclose, certainly nothing more than that defendant gratuitously undertook to repay this loan out of his father's assets, and I cannot see, however much defendant might have thought himself bound to repay it, whether as a point of honor or on the score of honesty, that the payments he made can be construed into anything more than a voluntary courtesy on his part, and they certainly carry with them no continuing obligation. It has been decided in the Courts in England over and over again, that a mere moral obligation, however sacred, is not a sufficient foundation for a binding promise (save perhaps where there has been a legal right which has become devoid of a legal remedy), and as it is clear to me that no debitum existed when the receipt was given, it follows by the application of this principle that plaintiff's claim is not recoverable by any course of law.

For this reason I decide the 1st issue in defendant's favor. The 2nd issue is not necessary for the determination of the suit, and in regard to the 3rd, I think that if the debt had had any legal existence, defendant, who alone took under the will, would have been personally liable, as a debt due by the estate of his father. The result, however, is that plaintiff's suit is dismissed, and I see no reason why he should not pay defendant's costs, save the bill which I disallowed in an order of this Court, dated 21st January.

The plaintiff preferred a regular appeal on the grounds that:—

The Judge was wrong in holding that the deed of release included the Rupees 25,000 sued for.

Oral evidence was admissible to explain the circumstances under which the deed was executed with a view to show its meaning.

The Judge ought upon the whole evidence to have found in favor of the plaintiff.

Mayne for the appellant, the plaintiff.

O'Sullivan for the respondent, the defendant.

The Court delivered the following

JUDGMENT:—Before the Lower Court, in a plaint singularly meagre, the claim was for a sum of Rupees 25,000 advanced on account of the Shivaganga zamindári, for which defendant, cognizant of the advance, had given a receipt.

The answer was that this debt due by the late G. F. Fischer had been validly released. That a release was executed as part of a complete and complex family arrangement is not disputed, that this claim is embodied and was intended to be embodied in that written release is also undisputed.

The claim made rather upon the evidence than the plaint, was that a contemporaneous oral agreement had left this as a subsisting demand. Following that case, the reasons for appeal were that the Rupees 25,000 were not within its scope. The Civil Judge dismissed the suit, holding that this oral evidence could not be adduced to contradict the written

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one. This is undoubtedly a sound and wholesome principle. Cases like *Lindley* v. *Lacey* (17 C. B. N. S. 578) and *Malpas* v. *S. W. R. Co.* are not exceptions to the rule. The agreements there were held to be distinct collateral oral agreements not inconsistent with the written one. *Wake* v. *Harrop* (1 H. & C. 202) was a case of equitable relief on the ground that through mistake of both parties the written words did not represent their intention. *Lyall* v. *Edwards* (6 H. & N. 337) is an instance of relief because the release in terms included more than the parties could have intended, and for the very satisfactory reason that the demand had not come to the knowledge of the party releasing. Now there is no pretence of any such mistake here. On the contrary, the evidence is that the parties well knew the effect and sought to obviate that effect by a contemporaneous oral agreement. On the ground on which the case was put in the Lower Court and in the original grounds of appeal it manifestly fails. In other grounds, not filed in accordance with the rules, Mr. Mayne has put the case upon a distinct oral contract of old Fischer first, and also of the defendant, for the good consideration that the lac of Rupees was to be settled on old Fischer's grand-children, the daughters of plaintiff and nieces of defendant. This is in form a more plausible, but in substance, perhaps, not a different mode of making the same attempt. The principle still is.—Is the matter of the contemporaneous oral agreement so outside the scope of the written one that they can logically subsist together, so that the oral shall neither contradict nor modify the written ?

Now, in the elaborate family arrangement, embodied in writing, very valuable property was conveyed to the plaintiff, who covenanted to settle a lac of Rupees on his own children and to release G. F. Fischer from all demands, among which by no mistake, excusable or otherwise, the present was included. To set up an oral agreement that the sum so released should in fact be paid is to deal with an object already embodied in the written agreement in a manner antagonistic to its provisions. It is not only to vary what the words do mean but what they were intended

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to mean. We think it probable that old Fischer did intend to add this Rs. 25,000 to many other acts of bounty previously conferred on the plaintiff, but a sound and, as we believe, salutary rule of law prevents our saying that there is any evidence whatever of a binding obligation. The evidence of an agreement by the defendant, Robert, is still looser. As to what is said to have occurred at the bedside, Robert's promise to carry out his father's wishes, if made, was made in his capacity of manager, for this is the only effect of the plaintiff's own evidence. The subsequent receipt for the money will not create a debt, for the release had already extinguished it. His subsequent payments and the letters written, both on the one side and on the other, are inconsistent with the belief of either party that there was a separate contract of Robert's. Both of them treat the payment as of a debt due by the father. There is, however, no evidence of an obligation even of Fischer the elder, and even if there were, the suit against the present defendant alone must have failed entirely. We are not disposed to credit the affectation of total ignorance of the scope of the release on the part of Robert Fischer. The true explanation probably is, that both believed that the advance having been made for the benefit of the zamindári of which the lease had passed to Robert, this, coupled with the father's intention, constituted the strongest moral, perhaps even a legal, claim upon him to whom that zamindári had passed. The prominence given to the purpose of the loan in the plaint seems to render this view very probable. It is clear, however, that in the absence of proof that there was a debt of Fischer the elder, and in the presence of positive proof that there was not, neither the express promise to pay the money as a debt, nor payments on account, can create the obligation which it is here sought to enforce. The same principle is applicable both to the original and the irregularly amended aspect of the case, and this appeal suit must be dismissed with costs.

Appellate Jurisdiction. (a)

Referred Case No. 48 *of* 1871.

Y. ANNAJI' RAU

against

RA'GUBAI *alias* SI'THABAI,

and JI'VUBAI.

Regulation XXXIV of 1802 having been repealed, a claim, in a suit between Hindus, for an amount of interest exceeding the principal sum due, is maintainable.

1871. *November* 20. *R. C. No.* 48 *of* 1871.

THIS was a case referred for the opinion of the High Court by H. P. Gordon, Acting Judge of the Court of Small Causes at Chittúr, in Suit No. 524 of 1871.

The suit was brought to recover Rs. 251, being the principal (Rs. 100) and interest (Rs. 151) due on a bond dated 29th February 1865. The Judge doubted whether, the suit being one between Hindus, interest exceeding in amount the principal sum sued for could be recovered, and he referred the following question,—Whether, in a suit between Hindus, on a bond conditioned for the payment of a certain sum with interest, a claim for an amount of interest exceeding the principal is maintainable?

No counsel were instructed.

The Court delivered the following

JUDGMENT:—A practice long existed of never either asking or decreeing more than an amount of interest equal to the principal. That practice, however, was based upon a special provision of the law which is repealed (Sec. IV. Reg. XXXIV of 1802). That Regulation was repealed in 1855, but the former practice still continued. We are unable to say that as positive law this limitation now exists. As to the Hindu law, it is not binding as Law upon such matters in the Mofussil.

(a) Present:—Holloway and Kindersley, J. J.

Appellate Jurisdiction. (a)

Special Appeals Nos. 359 *and* 401 *of* 1870.

APPUNI, the present VE'LIA KAIMA'L of EKANATHA, styled AYAMPALLI RA'MAN KUMA'RAN.	*Special Appellant in No.* 359.
A'YANEPALLI EKANATHA THAVAI VARIKARNAVAN SHANGUNI.	*Special Respondent in No.* 359, *and Special Appellant in No.* 401.
VELLUTHADATHA SHA'MU and 3 others.	*Special Respondents in No.* 401.

Suits by a branch Karnavan of a Malabar tarwád to recover certain lands belonging to his branch tarwád, which had been mortgaged by a former branch Karnavan. Plea, that the plaintiff had no right to sue without the authority of the senior member of the family, the Vélia Kaimál. Upon an issue sent (in Special Appeal) by the High Court, it was found by the Civil Judge that there was no binding and peculiar custom in the family depriving the senior member of all management of the property and vesting it in the branch Karnavans. Upon the final hearing it was contended that the contrary had been so irrevocably fixed by judicial decision as to prevent the matter from being open to question, and that this finding was bad in law, as being opposed to binding decrees of competent Courts.

Held, By HOLLOWAY, J.—(1.) That there was nothing compelling the Court to decide, contrary to the plain rules of law, that this delegation was irrevocable ; that, perhaps, it was not so even by the delegator, and still less was it so by his successors. (2.) That the fact of the setting apart of stánam property, if it was set apart, can make no difference, and as little can the circumstance of the income reserved. (3.) That there was nothing to prevent the Court from deciding that the Civil Judge was right in saying that this was an ordinary Malabar tarwád. (4.) That the renunciation before the Sadr Court was not even irrevocable as against him who made it, and certainly could not have the effect of depriving the senior member, for all future time, of the rights which the law of the country conferred upon him with the correlative duties upon his becoming senior.

By SCOTLAND, C. J.—That the Court was not constrained to hold that the irrevocability of the arrangement effected in 966 by the former head of the family, as to the apportionment of the family property between two Taverai's and the management of each Taverai's allotment by its senior member, was a matter conclusively adjudicated in the course of the litigation of which there was proof in the records. That such arrangement operated only as a personal renunciation and delegation of the rights of management possessed by the then head of the tarwád ; and that assuming it to have been irrevocable by him, it was not binding on the 3rd defendant, admittedly the head of the family by right of seniority.

THESE were Special Appeals against the decision of F. C. Carr, the Civil Judge of Calicut, in Regular Appeal No. 209 of 1869, modifying the decree of the Court of the Principal Sadr Amín of Calicut in Original Suit No. 15 of 1863.

1871. *May* 8, *July* 5.

S.A. *Nos.* 359, 401, 358 *and* 872 *of* 1870 ; 449 *of* 1869, *& C. M.* S. A. *No.* 56 *of* 1870.

The plaintiff in this case was the branch karnavan of the Ekanatha tarwád, and he sought to recover possession of

(*a*) Present ;—Scotland, C. J. and Holloway, J.

1871. May 8, July 5.

S. A. Nos. 359, 401, 358 and 372 of 1870; 449 of 1869, & C. M. S. A. No. 56 of 1870.

certain properties belonging to his branch tarwád, and which were assigned on kánam by a former branch karnavan to the 1st and 4th defendants.

The defendants, acknowledging the plaintiff to be the branch karnavan, and 1st and 4th defendants acknowledging that they held the lands on kánam dated 1036 and 1037, from the 3rd defendant, denied the plaintiff's right to sue; urging that, without authority from the senior member of the family, the branch karnavan had no real right over the property of the tarwád.

The Principal Sadr Amín, in his judgment, discussed at considerable length the subject of the position of the senior head of the family with reference to the property of the whole family, and declared that the right of managing the affairs of the whole tarwád was vested in the senior member or Kaimál; and, consequently, decreed that the plaintiff could not recover the mortgaged property.

Against this decree the plaintiff appealed, again urging his right over the Taverai property in his capacity of branch karnavan, and stating that in declaring the Kaimál's power to extend over the whole family property, the Principal Sadr Amín had adjudicated upon a matter which was not in the plaint.

The Civil Judge in his judgment said:—

"The principal points at issue are, whether in mortgaging the property the 3rd defendant was acting on his own authority as branch karnavan, or whether he was acting under authority specially delegated to him by the Kaimál of that time.

Secondly—whether the plaintiff in succeeding to the position of branch karnavan, is entitled *proprio motu*, and without any co-operation of the Kaimál, to take action for the recovery of these lands.

Except as it may incidentally affect these two questions, I cannot allow that the position of the Kaimál, and his right of control over the property of the several branches, are questions in this case, and I am of opinion that the Principal Sadr Amín has erred in making that the prominent issue in this

case, rather than the narrower questions to which the plaint limits the Court. In other words, the Court has to look only to the custom of this family in giving independent power to the branch karnavans, and not to consider primarily the social status of its head.

If this family be considered an ordinary one, following in all points the general custom of their caste, then it is clear that the plaintiff has not authority to sue for the recovery of family lands without the consent of the senior member of his family; but if, on the other hand, it be shown that the custom of this family has been to leave the management of each branch in the hands of the respective heads of those branches, the plaintiff will clearly be authorized to sue for the restoration of his branch family lands and to obtain a decree.

After a careful perusal of the records of this case, and the numerous exhibits that have been filed, I find myself unable to concur in the opinion of the Principal Sadr Amín.

From the year 966 this family has been divided into two branches or Taverais, each of them being managed by an anandraven of the family who is called branch karnavan; the senior member is called the Kaimál or Vélia Kaimál, and the senior of the branch karnavans, who is the next in succession to the office and dignity of Kaimál, is occasionally called the Ellaya Kaimál. The object, no doubt, of the arrangement then entered into was, that as the family and its property had grown too large to be looked after by one karnavan, as is the case with most of the Marumakkattáyam families, it should be looked after by the two next senior members, the senior member withdrawing into a position of dignified retirement."

[The Judge then proceeded to comment on the evidence adduced in the case and continued—]

"From all the former history of this family it is manifest that it is one which, though following the regular rule of Marumakkattáyam, is so far peculiar that there has been a regular division into Taverais, which division has existed since 966, viz. 78 years.

1871. May 8, July 5. S. A. Nos. 359, 401, 358 and 372 of 1870; 449 of 1869, & C. M. S. A. No. 56 of 1870.

From the records which are before the Court it is clear that, almost invariably, the branch karnavans have managed the property of their branch; though no doubt occasionally, and probably in all cases of permanent alienation and in matters of special importance, the consent and co-action of the Kaimál would be desirable, if not absolutely necessary. During the time that the 3rd defendant himself was branch karnavan, he consistently managed the affairs of that branch, and he endeavours to make that fact tally with his present contention by asserting that in all his acts, when he was branch karnavan, he was acting solely as agent for the then Kaimál and under a special karar given to him...............

Everything goes to support this inference, which is also *prima-facie* the most intelligible and reasonable one, that the manager of the branch property was really a manager; while the very assumption by the head of this family of a separate title, and the dropping by him of the usual designation of karnavan or manager, would further imply that the branches were managed directly by their own, so called, managers.

For these reasons I consider that the plaintiff in his capacity of branch karnavan has a right to bring this suit; and I, accordingly, reverse the decree of the Lower Court and decree for the restitution of the lands to the plaintiff, upon his paying the amount due to the 1st and 4th defendants for the improvements, &c. made upon them, which will be settled at the time of the execution of this decree. That portion of the judgment which cancels the perpetual kánam right granted (as alleged by the plaintiff) in 1036 by the 3rd defendant, is affirmed, because a perpetual alienation of family property without sufficient cause shown, and without the consent of other members, is an unwarranted act on the part of the manager of a family.

The portion of the decree which declares the right of managing the affairs of the whole Ekanatha tarwád to be vested in the Kaimál, is cancelled, as being an adjudication upon a matter foreign to the point at issue."

The 3rd defendant, the Vélia Kaimal, appealed in *Special Appeal* No. 359.

The plaintiff appealed in *Special Appeal No.* 401.

At the first hearing of the appeals the High Court referred the following issue to the Civil Judge.—"Whether there was a binding and peculiar custom in the family, depriving the senior member of all management of the property and vesting it in the branch karnavans." The Civil Judge found that there was no such custom.

1871. *May* 8, *July* 5.

S. A. Nos. 359, 401, 358 *and* 372 *of* 1870; 449 *of* 1869, *& C. M. S. A. No.* 56 *of* 1870.

Upon this return the appeals came on again for hearing together with the following—

Special Appeals Nos. 358 *and* 372 *of* 1870.

THIPEN'S son CHELEN and another ... *Special Appellants in No.* 358, *and Special Respondents in No.* 372.

A'YANEPALLI EKANATHA THAVAI KARNAVAN SHANGUNI............ *Special Respondent in No.* 358, *and Special Appellant in No.* 372.

These were Special Appeals against the decision of G. R. Sharpe, the Civil Judge of Calicut, in Regular Appeal No. 320 of 1869; modifying the decree of the Court of the Principal Sadr Amín of Calicut in Original Suit No. 16 of 1863.

Special Appeal No. 449 *of* 1869.

EKANATHA SHANGUNI......*Special Appellant.*

AYAMPALLI EKANATHA APPUNI. *Special Respondent.*

This was a Special Appeal against the decision of I. V. K. Ramen Náir, the Principal Sadr Amín of Calicut, in Regular Appeal No. 66 of 1869, confirming the decree of the Court of the District Munsif of Pattambi in Original Suit No. 64 of 1860.

Civil Miscellaneous Special Appeal No. 56 *of* 1870.

SHANGUNI.............................*Appellant.*

APPUNI......................................*Respondent.*

This was an appeal against the order of C. R. Pelly, the Civil Judge of Calicut, dated 12th November 1869, confirming the order of the Court of the District Munsif of Pálghát, passed on Miscellaneous Petition No. 1242 of 1869.

1871. May 8, July 5.

S. A. Nos. 359, 401, 358 and 372 of 1870; 449 of 1869, & C. M. S. A. No. 56 of 1870.

The same question being at issue in all these suits, the appeals were heard together.

The Advocate General for the appellants in Special Appeals Nos. 401 and 449, and in C. M. S. A. No. 56; and for the respondents in S. A. No. 359.

O'Sullivan for the appellants in Special Appeals Nos. 358 and 359, and for the respondents in Special Appeals Nos. 401 and 449 and in C. M. S. A. No. 56.

J. H. S. Branson for the appellants in S. A. No. 372, and for the respondents in S. A. No. 358.

Sanjiva Rau for the respondents in S. A. No. 372.

The Court delivered the following judgments :—

HOLLOWAY, J.—On the issue referred the question is whether there is a binding and peculiar custom in this family depriving the senior member of all management of the property and vesting it in two persons called the branch karnavans. The Civil Judge has found the contrary on a considerable amount of evidence, and his decision is conclusive unless, as the Advocate General contended, the contrary has been so irrevocably fixed by judicial decision as to prevent the matter from now being open to question, and this decision on the matter of fact bad in law as opposed to binding decrees of competent Courts.

The basis of all these decrees is a certain arrangement alleged to have been made by a former head of the family. The document by which this arrangement was made and upon which all the decrees unfavorable to the senior member are based following C (1826), is a document by which the management of certain items of property is assigned to a particular person, called for the purposes of this case the branch karnavan. There appears to have been a second of the same purport in favor of another. It must be observed that such arrangements are not uncommon in families following the ordinary rule, and their existence is not the most slender evidence of the prevalence of anything but the usual custom of the family. Further, it is undoubted law, as stated in the earliest of these documents, that the head may modify such

1871. May 8, July 5.

S.A. Nos. 359, 401, 358 and 372 of 1870; 449 of 1869, & O. M. S. A. No. 56 of 1870.

arrangement when he pleases, and we have recently expressed a strong inclination of opinion that the doctrines as to the power of renunciation do not apply to a person in the position of a Malabar karnavan(a). This was the distinct opinion of the Provincial Court in the earliest of these documents, and the Provincial Court was at that time composed of men (among them Stevens, a friend of the Duke of Wellington) very well acquainted with the custom of Malabar. This doctrine is repeated by the Sadr Court, by the Principal Sadr Amín of Calicut, who goes on the agreement not having been set aside, and by Mr. Strange, in his judgment, who treats the agreement as being merely a specific declaration of what the Law of Malabar would otherwise have enforced, that the sale or encumbering of property without the assent of the junior members, or at all events of the senior anandravan, is not permissible (D). This opinion as to the Law is important when we come to scrutinize the binding character of the judgments in question. It is another very curious rule of law, long supposed to be binding, that a man cannot turn out his own agent without a special suit for the purpose. I have seen many decrees based upon this strangely absurd doctrine. One, I remember, in which the Zamorin wanted to disallow further acts of his predecessor's agent, and the suit was got rid of because this could only be done by first removing the agent by regular suit and paying a stamp on the whole property, which must be included. Dozens of Pagoda cases have been decided in the same way, and show an opinion as to the effect of contracts which must have an important influence in determining the weight to be given to these decisions as to status. The same doctrine runs through the decision of Mr. D'Silva, the late Principal Sadr Amín of Calicut. He admits the power of the head to get rid of his delegating order, but states that he has not done so,—an opinion which would be incomprehensible without understanding the strange views of the law of agency for many years administered by the Malabar Courts. I remember producing a startling effect upon all the practitioners before me when I decided, I am

(a) See p. 145 of this Volume.

1871. May 8, July 5. S. A. Nos. 359, 401, 358 and 372 of 1870; 449 of 1869, & C. M. S. A. No. 56 of 1870.

afraid with no respectful expressions as to the venerable doctrine, that a man could remove his own agent. Reading all these judgments, with the views of the Judges as to the binding character of such agreements, it seems to me quite impossible to say that a binding decision upon the status of the family could alone have led to the decrees passed.

Further, there are conflicting decisions on this very point of status, and with conflicting decisions in English Law there can be no pretence of an estoppel. The order of the Provincial Court is a distinct decision that this family is bound by the ordinary law of Malabar.

The question of how far the matters of fact which are stated as objective grounds of the decision are *res judicata* is still a matter of warm controversy, and Unger, supported by several other great jurists, has in his cogent manner (§ 132) strongly attacked the doctrines propounded by Savigny and supported by Vangerow, Windscheid and others. It is undoubted that Unger's views are more accordant with the view of the law entertained by DeGrey, C. J., while those of Savigny are more accordant with the modern English cases. It is impossible to mistake the extreme danger of so great an extension, but I will only say, as it is sufficient for the present case to say, that those who follow Savigny admit that it must be confined to such grounds as the Judge has determined because he must determine them. Now, any one of these Judges who entertained the prevalent views of the law of agency and erroneous views of the power of renunciation both for himself and his successors would have had ample ground for sustaining any one of these decisions. The mischief to this family from breaking down the plain rule of the Provincial Court is perfectly manifest. They have been for 70 years worrying one another, litigating, admitting and denying.

I am of opinion—1. That there is nothing compelling us to decide contrary to the plain rules of law that this delegation is irrevocable, perhaps it is not so even by the delegator and still less is it so by his successors—2. That the fact of the setting apart of stánam property, if it was set apart, can make no difference, and as little can the cir-

cumstance of the income reserved—3. That there is nothing to prevent us from deciding that the Civil Judge is right in saying that this is an ordinary Malabar tarwád, and if I were at liberty to go into the fact I should entertain no doubt of it—4. That the renunciation before the Sadr Court is, I am disposed to think, not even irrevocable as against him who made it, and certainly could not have the effect of depriving the senior member for all future time of the rights which the law of the country conferred upon him with the correlative duties upon his becoming senior.

With so peculiar a condition of property as that of Malabar, it is most essential for the avoiding of complete anarchy and consequent ruin to maintain the distinct rule as to the karnavan's powers. Wherever it is infringed, the miserable consequences apparent in the present case immediately result. The declaration of the Principal Sadr Amín must, therefore, be confirmed in all respects, for his finding, confirmed by the Civil Judge, is that the perpetual kánam is void as not made for a family purpose, and this can both be raised by a junior member and decided in a suit by him.

In S. A. No. 401 *of* 1870.—The result of the judgment in No. 359 of 1870 will be the dismissal of this appeal.

In S. A. Nos. 358 *&* 372 *of* 1870.—Following the judgment in 359, the decree of the Civil Judge so far as it alters that of the Principal Sadr Amín must be reversed.

In S. A. No. 449 *of* 1869.—The dismissal follows the decision in 359 of 1870.

In Civ. Mis. S. A. No. 56 *of* 1870.—The result of the Judgment in 359 of 1870 will be the dismissal of this appeal.

SCOTLAND, C. J.—Having considered these cases since the argument, I concur in the conclusions that we are not constrained to hold that the irrevocability of the arrangement effected in 966 by the former head of the family as to the apportionment of the family property between two Taverais, and the management of each Taverai's allotment by its senior

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S. A. Nos. 359, 401, 358 and 372 of 1870; 449 of 1869, & C. M. S. A. No. 56 of 1870.

member, is a matter conclusively adjudicated in the course of the litigation of which there is proof in the records: that such arrangement operated only as a personal renunciation and delegation of the rights of management possessed by the then head of the tarwád; and that assuming it to have been irrevocable by him (a point on which I entertain at present doubts) it is not binding on the 3rd defendant, who is admittedly the head of the family by right of seniority.

Upon these grounds, and the conclusive finding of the Court below against the existence of any governing custom in the family making the position of the 3rd defendant different as respects the right to the management of the whole of the family property from that of an ordinary karnavan of a Malabar tarwád, I agree in the opinion that the claim of the plaintiff to recover the lands held by the 1st and 4th defendants is not maintainable; and that, consequently, the decree of the Civil Court, so far as it orders the restoration of those lands to the plaintiff, must be reversed, and that it must be declared that the 3rd defendant is the karnavan of the tarwád, and as such entitled to the management of the whole of the tarwád property. The other portion of the Civil Court's decree cancelling the perpetual kánam granted by the 3rd defendant, and adjudging the parties to bear their own costs, will stand affirmed. I think the parties should bear their own costs in this Court.

Appellate Jurisdiction. (a)

Regular Appeal No. 120 *of* 1870.

ERAMBAPALLI KORAPEN NA'YAR and 2 others. } *Appellants.*

ERAMBAPALLI CHENEN NA'YAR and 9 others. } *Respondents.*

In Malabar the word "taverai" has several distinct meanings. In the families of the princes all the houses have separate property and the senior in age of all the houses succeeds to the Royalty with the property specially devoted to it. This mode of succession may be regarded as rather due to public than to private law. Private families have sometimes adopted the same customs, but there is the strongest presumption against the truth of this in the case of a private family. Families becoming very numerous have often split into various branches; in the language of the people 'there is community of purity and impurity between them, but no community of property.' In the only sense of the word with which Courts of Justice are concerned, people so related are not of the same tarwád. Where there are several houses bearing the same original tarwád name, but with an addition, and there is no evidence of the passing of a member of one house to another; there is the strongest ground for concluding that this separation has taken place.

1871. *March* 15, *November* 27. *R. A. No.* 120 *of* 1870.

THIS was a regular appeal against the Decree of F. C. Carr, the Acting Civil Judge of Calicut, in Original Suit No. 1 of 1870.

The suit was brought to obtain a decree declaratory of the plaintiffs' right to be considered members of the Erambapalli tarwád.

The main defence set up was that the plaintiffs belonged to a separate family called strictly the Erambapalli Parasherri tarwád, whereas the defendants' family was strictly called the Erambapalli Vadakanjerri tarwád, and that though they were descended from a common stock, yet that these were in reality separate tarwáds, to whom although they [the defendants] acknowledged that there was community of pollution [Pula Samandham], they asserted that there was no community of interest [Mudalsamandham], and consequently that although the plaintiffs had the name of Erambapalli, they were not entitled to be declared anandravans of their family, viz., the Erambapalli Vadakanjerri.

The issue settled was—

(a) Present :—Holloway and Innes, J. J.

1871. March 15, November 27. R. A. No. 120 of 1870.

Whether the plaintiffs had a right to a share of the property belonging to the "Erambapalli tarwád," as alleged in the plaint.

The Civil Judge was of opinion that the plaintiffs had made out their title to be considered members of the Erambapalli tarwád, and that as anandravers of the tarwád they had a claim upon the tarwád land, in accordance with the law of Malabar.

The defendants appealed.

At the 1st hearing of the appeal the High Court, in referring certain issues, delivered a judgment from which the following is extracted.—

"The decision that the plaintiffs are of the same tarwád does not settle the question. It may be that they are of the same tarwád and of different taverais, and that each has perfectly separate property. We see no reason for dissenting from the view that the tarwád is the same and we feel it necessary to refer the issues :—(1) Do they belong to different taverais of the same tarwád and what taverais?

(2) Has each taverai a right to separate enjoyment of property, or is the whole property of the family in joint enjoyment?

(3.) Over what property, on the result of these findings, have the plaintiffs a claim to enjoyment as family property?"

The Civil Judge (G. R. Sharpe) in returning findings upon these issues said :—

"Using the word Taverai in its strictest meaning there is no doubt, and plaintiffs themselves must admit that they and defendants are not the same taverai, *i. e.* are not children of the same mother. It is necessary in this suit, however, to go further back than the mother, and plaintiffs point to one Ittiada Amah as the common ancestress of themselves and of defendants through her two daughters Unniperi Amah and Imbichi Amah. Defendants on the other hand deny any such common descent and state that "no community of interest has existed between them and plaintiffs'

1871. *March* 15, *November* 27. *R. A. No.* 120 *of* 1870.

ancestors from a very remote time." The evidence appears to me to be in favor of defendants' contention. [He then commented at length upon the evidence and arrived at the conclusion—] "That no community of interest exists between plaintiffs and defendants, or, in other words, that they belong to different taverais, possessing a right to the separate enjoyment of property, that of the former being called by distinction the Erambapalli Parasherri and that of the latter the Erambapalli Vadakanjerri Taverai." "Consequently I also find the non-existence of any family property to which plaintiffs have any claim in common with defendants."

Upon these findings the case came on again for final hearing.

The Advocate General for the appellants, the defendants.

J. H. S. Branson for the 1st and 2nd respondents, the 1st and 2nd plaintiffs.

O'Sullivan for all the respondents, the plaintiffs.

The Court delivered the following judgments.

November 27.

HOLLOWAY, J.—The question is whether we can come to a conclusion adverse to that of the Civil Judge that these plaintiffs and defendants are not of the same tarwád; using that word in the sense of a body of persons with community of property and common rights of the eldest to succeed to the management of it. It was scarcely attempted to show that the Civil Judge's opinion of the worthless character of the oral evidence is unfounded. The document A is really susceptible of a double explanation, and the undisputed facts that there have long been separate houses, that there have been dealings as persons with separate proprietary interests, are strong in favor of his conclusion. The management of Chandu, a male of a distant branch, and the restoration of the management to one of the defendants' branch when old enough to assume the post, is really in favor of the same conclusion; for it is undoubtedly the accepted popular view of tarwád property, that, on the extinction of a

1871. November 27. R. A. No. 120 of 1870.

particular house, it goes over to other houses traditionally connected, but long severed in point of rights of property.

In Malabar this word "taverai" has several distinct meanings. In the families of the princes and notably in that of the Samutiripad Rájah, all the houses have separate property, and the senior in age of all the houses succeeds to the royalty with the property specially devoted to it. Other princely houses follow the same rule, and this mode of succession may be regarded as rather due to public than to private law.

With that mimicry of the customs of the great as common elsewhere as in Malabar, private families have sometimes adopted the same customs. The more common case, however, is of their having pretended to have adopted them, when some ambitious and unscrupulous junior member sees a pecuniary benefit in setting up such a case. It may be safely asserted that in the case of private families there is the strongest presumption against its truth. As in all Hindu law, so in the archaic form of it which exists in Malabar, the first conception of a family is of an indissoluble unity, a mere aggregate with no separate rights, living under one head, united more especially by their connexion with the same sacra. In Malabar, as elsewhere, the inconvenience of this state of things has made itself felt, and families becoming very numerous have split into various branches, have, in fact, become new families. The common speech of the people is the best evidence of customary law, and when they speak out of Courts of Justice they are often truthful enough. Every man who has conversed much with Malayalis must have heard the very common expression in answer to the question—Is such a man of your tarwád?—"There is com-"munity of purity and impurity between us, but no com-"munity of property." In one sense of the word people so related are still of the same tarwád; in the only sense with which Courts of Justice are concerned they are not. Where there are several houses bearing the same original tarwád name, but with an addition, and there is no evidence of the passing of a member of one house to another; there is the

strongest ground for concluding that this separation has taken place. Where, as in a case recently decided by the Chief Justice and myself from the same Court(a), an attempt is made to set up a family rule, and more especially by contract, excluding the karnavan from all management of property, although the senior of the houses invariably becomes karnavan, such an attempt can scarcely ever succeed. The presumption of unity and of the existence of the ordinary rule is too strong.

It seems to me that the evidence shows precisely the case of severance which I have described. One of the several branches having become better off than another, that other, by virtue of the ambiguity of a word, is seeking to reap that which it has never sown, and to which, on the true understanding of the customs of the people, it is wholly unentitled. I would declare that the plaintiffs and defendants were originally of the same tarwád, but that there has ceased to be community of rights of property between them. The plaintiffs should, I think, pay the costs throughout.

INNES, J.—I have felt some difficulty in coming to an opinion on the evidence of this case from a want of familiarity with the customs of Malabar. On consideration I am not prepared to dissent from the opinion of the present Civil Judge, formed on a careful weighing of the evidence, and concur in the judgment of my learned brother and the declarations proposed to be made. I agree that plaintiffs should pay the costs throughout.

Appeal allowed.

(a) The case referred to would appear to be that reported at p. 401 of this Volume.—[*Ed.*]

Appellate Jurisdiction. (a)

Special Appeal No. 433 *of* 1871.

CHERIYARAKEL *alias* ARAKEL KUNHI KUTTIYALI. } *Special Appellant.*

VAYAKA PARAMBATH IMBICHI AMMAH...*Special Respondent.*

Suit for redemption of an otti by an alleged purchaser of the same, and for recovery of land on which he had purchased a kánam. The defence was that the purchase was made by the father of the 1st defendant, and that the plaintiff was, constructively, a mere trustee. The Munsif decreed for the plaintiff, and the Principal Sadr Amín reversed his decree because the suit was not brought within a year of a release of the property from attachment under a claim of the defendants, which attachment was made in execution of two decrees for money against the present plaintiff. It appeared that in the proceedings had releasing the property from attachment no notice was issued to the judgment-debtor (present plaintiff). *Held*, that the decision of the Principal Sadr Amín was wrong. In the present case, the claimants in possession were not so according to any of the modes of derivation which Section 246 enumerates as authorizing the continuance of the possession and the dismissal of the claim. The possession was in the claimants, and there was nothing in the rights of the judgment-debtor which could make such possession his possession. This being so, even assuming that he was a party to the order made, such order could not be said to be against him; because his claim was one which could not have been determined by any order made under Section 246. The order so made was perfectly consistent with his present contention.

Special Appeal No. 541 *of* 1868 (4 M. H. C. R. 472) distinguished.

1871. December 6. *S. A. No.* 433 *of* 1871.

THIS was a special appeal against the decision of J. K. Ramen Nair, the Principal Sadr Amín of Calicut, in Regular Appeal No. 285 of 1870, reversing the decree of the Court of the District Munsif of Calicut in Original Suit No. 195 of 1868.

The suit was brought to recover, with arrears of rent, five parcels of land, of which Nos. 1 to 4 were plaintiff's jenm, and held by the defendants on otti, and No. 5 one on which plaintiff had a kánam claim, on payment of the otti and kánam amounts. The plaintiff alleged that Koyali (deceased), the father of the 1st, and grandfather of the 2nd and 3rd defendants, held the lands Nos. 1 to 4 on otti, and No. 5 on simple lease. The 1st defendant answered that the jenm and kánam rights alleged by the plaintiff were acquired by her (1st defendant's) father Koyali in plaintiff's name: that plaintiff had no right to the property, and that the suit was

(a) Present :—Morgan, C. J. and Holloway, J.

barred by the Act of Limitation, as an attachment of this property for a debt due by plaintiff was released on her application on the 25th February 1867, and the present suit was not brought within one year from that date.

1871. December 6. S. A. No. 433 of 1871.

The Munsif decreed for the plaintiff.

The 1st defendant appealed.

The Principal Sadr Amín, reversing the decree of the Munsif, said—

"I am clearly of opinion that this suit is barred by Section 246 of Act VIII of 1859. The plaint property was once attached at the instance of a third party for plaintiff's debt, and the present 1st defendant appears to have laid claim to it, and had the property released from attachment,—vide Exhibit No. VIII. The present suit was not brought within one year from the date of that order, and it is, therefore, clearly unsustainable. I reverse the Munsif's decree, and dismiss the original suit with all costs."

The plaintiff appealed to the High Court against this decree of the Principal Sadr Amín, upon the grounds that the suit was not barred by the Law of Limitation, that the plaintiff was no party to the proceedings under the attachment, and was not summoned as a party or as a witness in the case, nor was any notice given to him.

O'Sullivan for the special appellant, the plaintiff.

The Advocate General for the special respondent, the 1st defendant.

The Court delivered the following

JUDGMENT:—The suit was for redemption of an otti by an alleged purchaser of the jenm and for recovery of land on which he had purchased a kánam.

The Munsif decreed for plaintiff, and the Principal Sadr Amín reversed his decree, because the suit was not brought within a year of a release of the property from attachment under a claim of the defendants. The attachment was made in execution of two decrees for money against the present plaintiff.

1871. December 6. S. A. No. 433 of 1871.

If Section 246 is applicable to the case, it seems plain that a new period of limitation will not be given by a second order upon a second attachment.

So to decide would be to render the rule quite illusory. Like all other periods of limitation, this will, of course, continue to run, and can only be interrupted by modes prescribed by the authority which enacted the rule.

The defence to the suit and presumably the ground of seeking the release from attachment is, that the purchase was made by the father of 1st defendant; that plaintiff was, in fact, constructively, a mere trustee.

It appears in the present case that notice was not issued to the judgment-debtor, and that he was not a party to these proceedings which ended in the release of the property, unless the word party must, under this section, receive an extended interpretation. The point decided in 4 M. H. C. 472, was that an order prejudicial to the right of the judgment-debtor would put him, as well as the claimant, to his action within the year; because, within the meaning of the section, he was a party against whom the order was given. In the present case, the claimants in possession were not so according to any of the modes of derivation which the section enumerates as authorizing the continuance of the possession and the dismissal of the claim. The possession was in the claimant, and there was and is nothing in the rights of the judgment-debtor which could make such possession his possession. This being so, and assuming, as for the present purpose we seem bound to do, that he was a party to the order made, we are clearly of opinion that the order so made cannot be said to be against him, because his claim is one which could not have been determined by any order under Section 246. The order, so made, was not only not against his present contention, but was perfectly consistent with it; and, if its existence had been found affirmatively, it could have had no influence upon the result; it would still have been the duty of the court to release, because the possession was neither in trust for, nor on account of, the judgment-debtor. We are, therefore, relieved from saying anything as to

the case 4 M. H. C. R. 472. We think that an order admitting a claim which must have been admitted whether the plaintiff's (judgment-debtor's) contention is well or ill founded, cannot be an order against him so as to put him to a period of limitation other than that to which his original action was subject. It might be otherwise if he had been present and promoting a contention of the decree-holder which, if well-founded, would have justified the continuance of the attachment. We should, but for the case referred to, have had great difficulty in saying that he was a party to the order at all, but we think that this case may be decided without touching the ground of decision in that. All the judges there assume that the order was antagonistic to the title of the judgment-debtor and subsequent plaintiff. Here the case is manifestly otherwise. So far, therefore, as the suit for redemption is concerned, the decision of the Principal Sadr Amín seems to us wrong.

1871.
December 6.
S. A. No. 483
of 1871.

The case of the kánam is apparently subject to the same observation, for it does not seem that there has been any pretence of the possessors being persons paying rent to the judgment-debtors.

The decree of the Principal Sadr Amín on this preliminary point must be reversed, and the suit remitted for decision of the appeal on its merits. The costs of this proceeding will be costs in the cause, and be provided for on the passing of a final decree.

Appellate Jurisdiction. (a)

Special Appeal No. 440 *of* 1871.

TIRUMALASA'MI REDDI.............*Special Appellant.*

RA'MASA'MI REDDI..................*Special Respondent.*

Plaintiff stating that he was obstructed in the cultivation of certain land which belonged to him, asked that the obstruction be removed and damages granted. The damages were disallowed; but the Civil Judge declared that plaintiff was entitled, basing that entitlement on the Statute of Limitations. *Held*, that where a man seeks a declaration of a title other than the possession which he has, mere possession for the period of the statute will not justify the declaration, which, allowing it to be made, ought to be based upon a finding of the title alleged by plaintiff, and not upon the existence of a possession for the period required by the statute to bar the action of another. Accordingly, the Lower Appellate Court was required to return a finding on the issue "whether the title asserted by plaintiff is proved."

1871. *December* 8. *S. A. No.* 440 *of* 1871.

THIS was a special appeal against the decision of R. W. Barlow, the Acting Civil Judge of Chingleput, in Regular Appeal No. 46 of 1869, modifying the decree of the Court of the District Munsif of Karunguli in Original Suit No. 37 of 1865.

The plaint stated that 26¼ gulies of house-ground and backyard at Endattúr belonged to plaintiff, and that, on 1st January 1865, the 1st defendant, at the request of the 2nd, prevented plaintiff from cultivating 17 gulies of the same. Plaintiff, therefore, sued for enjoyment of the said 26¼ gulies, free of interference by defendants, and for recovery of Rupees 41-9-0 as damages.

First defendant pleaded that the plaint was false; that the land in question was defendants' ancestral property; that plaintiff's father was allowed to occupy their house on the said land, and 2 gulies of ground adjoining the house, on his executing to them an agreement on 5th Adi of Paritavi (18th July 1852), stipulating to make over the same within the year Raudri (1860-61), and to pay rent to them until that time; and that, as plaintiff knew that defendants were about to sue to eject him, he had instituted this suit.

Second defendant was declared ex-parte.

(a) Present:—Morgan, C. J. and Holloway, J.

The District Munsif dismissed the plaintiff's claim with costs. 1871. *December* 8. *S. A. No.* 440 *of* 1871.

From this decree plaintiff appealed.

The Civil Judge confirmed that part of the Munsif's decree which dismissed the claim for damages. With regard to the other question, he gave no specific finding on the evidence of title adduced; but declared the plaintiff entitled in the following terms:—"In whatever way the plaintiff's family may have acquired the portion now in litigation, it seems clear that they have enjoyed for more than 12 years prior to the institution of this suit, and no payment of swámibogam on the part of plaintiff to them has been proved by the defendants during the said period, and it becomes unnecessary to comment further on the evidence in support of Exhibits I and II."

The defendant appealed.

Parthasáradhi Ayyangár for the special appellant, the 1st defendant.

Sloan for the special respondent, the plaintiff.

The Court delivered the following

JUDGMENT:—In this case plaintiff asks that the obstruction shall be removed and damages granted. The damages were disallowed. The Judge agreed with that disallowance, but declared that plaintiff was entitled. That entitlement he based upon the statute of limitations. Where, as in this case, a man seeks a declaration of a title other than the possession which he has, the mere possession for the period of the statute has been decided not to justify the declaration. Assuming for the present purpose, as in this case we will assume, that, after resisting the plaintiff's title and setting up his own, the defendant ought not to be allowed to urge that no declaration should have been made at all, it is clear that allowing it to be made it ought to be based upon a finding of the title alleged by plaintiff, and not upon the existence of a possession for the period required by the statute to bar the action of another. Wé, therefore, refer to

1871. December 8. S. A. No. 440 of 1871.

the Lower Appellate Court the issue whether the title asserted by plaintiff is proved.

It is, accordingly, hereby ordered that the foregoing issue be, and the same hereby is referred to the Lower Appellate Court for trial upon the evidence already recorded in the suit; the finding thereon to be returned to this Court within three weeks from the date of receiving this order.

Issue referred.

Appellate Jurisdiction. (a)

Civil Mis. Regular Appeal No. 278 *of* 1870.

ARABHI SE'SHA'CHELLAM APPA RAU, and others. } *Appellants.*

RA'MAYA.................................... *Respondent.*

A petition of regular appeal was rejected by the Civil Court, because it did not state what amount of quit-rent was payable to Government on the lands in dispute; and, therefore, did not contain the particulars required by the order of the High Court, dated 26th June 1867. *Held*, by the High Court, that the order of rejection was wrong. The utmost which the old rules justified was the non-receiving.

1871. December 13. C. M. R. A. No. 278 of 1870.

THIS was an appeal against the order of J. G. Thompson, the Civil Judge of Berhampore, dated the 7th May 1870, passed on Mis. Petition No. 517 of 1870.

A petition of regular appeal against the decree of the District Munsif of Chicacole, in Suit No. 373 of 1866, was rejected by the Civil Court of Berhampore on the ground that the amount of quit-rent payable to Government on the lands in dispute in that suit was not stated. On the following day the appellants made an application to be allowed to amend, which was also rejected.

The appellants appealed against the order rejecting this application.

The Advocate General for the appellants.

The Court delivered the following

(a) Present:—Holloway and Innes, J. J.

1871. December 13. O. M. R. A. No. 278 of 1870.

JUDGMENT :—The petition of appeal against the decree of the District Munsif was rejected, because it did not contain the particulars required by the order of the High Court dated 26th June 1867. We think that the order of rejection was wrong.

The utmost which the old rules justified was the non-receiving. The evil of the rejection is that the appeal is barred, while, if not received, the party might have produced it amended within the time.

Appellate Jurisdiction. (a)

Regular Appeal No. 116 *of* 1870.

R. RAGUNA'DA RAU...... ....*Appellant.*

NATHAMUNI THATHAMA'YYANGA'R.......*Respondent.*

Suit to recover damages from defendant, Deputy Magistrate of the zillah of Trichinopoly, for a trespass alleged to have been committed in execution of an order made by him under Section 311 of the Criminal Procedure Code, directing the demolition of the plaintiff's house as being a nuisance to a public thoroughfare. Defendant denied his liability, alleging in justification of his order that he believed the house to be obstructive to public comfort and proceeded in accordance with Sections 308, 310, and 311 of the Criminal Procedure Code, and that, having acted in good faith in discharge of his duties as a Magistrate, he was protected by Act XVIII of 1850. The issues settled were (1) whether the house was an obstruction and nuisance within Section 308 of the Criminal Procedure Code: (2) whether the defendant acted in good faith in the discharge of his public duty in ordering the removal of the house: (3) whether the plaintiff was entitled to the amount of damages claimed. The Civil Judge held, upon the 1st issue, that the defendant had no jurisdiction to order the removal of the house: upon the 2nd issue, that defendant had not acted with due care and attention, but from feelings of personal animosity towards plaintiff, and was, therefore, not protected by Act XVIII of 1850. Upon the 3rd issue, he assessed the damages at Rupees 500. The defendant appealed relying mainly upon the objection that no action lay against him inasmuch as, first, it had not been shown that he acted without jurisdiction in making the order complained of; and secondly, that even if he had acted without jurisdiction, he acted believing at the time in good faith that he had jurisdiction, and was, therefore, entitled to the protection given by Act XVIII of 1850. *Held*, upon the first point, that an entire absence of jurisdiction to make the order had been shown. Upon the second point, that the facts of the case furnished no reasonable or probable ground for belief in the existence of jurisdiction by a magistrate of ordinary qualifications: that the defendant must, therefore, be held not to have entertained that belief in good faith, unless the provisions of the Criminal Procedure Code, under which he acted, admit of the view that he might, not unreasonably, think that it was probably intended to apply to such an annoyance as that complained of. That, however, these

(a) Present :—Scotland, C. J. and Holloway, J.

provisions were open to such a misunderstanding and misapplication by a magistrate of ordinary qualifications, and consequently that the suit should be dismissed.

1871. April 17. May 8, 22. November 27. R. A. No. 116 of 1870.

THIS was a regular appeal against the decree of R. Davidson, the Civil Judge of Trichinopoly, in Original Suit No. 45 of 1869.

The following is a translation of the plaint:—

"This is a suit for Rupees 630-10-0, being the value of building, &c., and damages.

The house situated in the southern Uttirasidi (street) at Srírangam, bounded on the west by Kurattalvan's steeple, on the north by the wall (of the pagoda), on the east by Ariamangalam Seshiengar's land, and on the south by the street, and measuring 27 feet from east to west, and 24 feet from north to south, is the plaintiff's own. At the expense of a large sum he built two stories newly, and continued to enjoy the same.

The 1st defendant, when he was the Deputy Magistrate of this zillah, issued a notice to the plaintiff and his divided brothers, who had no concern in (the said house), on the 9th August 1867, to the effect that the said house had encroached upon the road and was obstructive; and that it should be removed within 30 days. Though it was contended that it was not right, no justice could be had.

The plaintiff instituted the suit No. 333 of 1867 on the file of this Court to have the right to the building established, and the notice cancelled; and an injunction was issued to the effect that nobody should interfere with the said building. Within the time specified in that injunction, *i. e.*, on the 12th September, the 2nd defendant gave a notice that the building would be demolished on the 13th, on which day it was demolished, and the materials of the said building, &c., were damaged in different ways. The plaintiff has consequently sustained a great loss.

The Civil Court called for the said Suit No. 333, filed it in No. 33 of the said year, and dismissed it, observing, among other facts, that the plaintiff did not appear.

On the appeal preferred so far as to the Government in respect of the fine inflicted for failure to demolish the building, the Government have passed an order on the 16th April of this year, to the effect that the removal of the building was wrong, and that the building may be constructed, and have also forwarded their proceedings to the Collector. In accordance therewith, the Collector also has given an endorsement on the 26th May last, allowing the house to be built. Moreover, in the judgment in Appeal No. 43 of 1868 on the file of the High Court, which was in respect of the land below, the plaintiff's right has been established, and (he) has been referred to a suit for damages. Though only the right to the said ground valued at Rupees 100 has been established, still, this suit is instituted on behalf of the plaintiff against the defendants who caused the damages, for the value of the buildings that stood on (the said ground), the value of the materials, and the damages sustained in consequence of the removal." *(Here follow the particulars of the amount to be recovered.)*

The 1st defendant filed the following written statement. "No unreasonable damage was caused to the plaintiff by the 1st defendant. Therefore the 1st defendant is not liable to pay any damages to the plaintiff.

The 1st defendant, when he was the Deputy Magistrate of Trichinopoly, believed that the building referred to by plaintiff was obstructive to public comfort, and gave a notice to the plaintiff under Section 308 of the Code of Criminal Procedure directing him to remove it within a month, and in the event of his not doing so, to show sufficient cause [why the 1st defendant's order for the removal of the said house should not be carried out, as the cause alleged by the plaintiff for the same did not appear satisfactory to the 1st defendant. He ordered the plaintiff to have recourse to the appointment of a Jury, which was the only remedy that the plaintiff had to establish the impropriety of the aforesaid order under Section 311 of the Criminal Procedure Code. The plaintiff did not appoint the Jury. Moreover, the plaintiff requested the Sessions Court by a petition to make a reference to the

1871. April 17. May 8, 22. November 27. R. A. No. 116 of 1870.

Honorable High Court under Section 434 of the Code of Criminal Procedure for setting aside the aforesaid order as being contrary to law. The Sessions Court having called for and perused the record, rejected the plaintiff's request, and passed an order that the aforesaid notice of the 1st defendant was not contrary to law.

Firstly a notice was issued under Section 308 of the said Criminal Procedure Code, and secondly an order was issued under Section 311, and under the provisions of Section 311 the building mentioned in the plaint was demolished and the materials sold. Therefore there can be no civil action against the 1st defendant for (his) having demolished the said ground or for (his) having sold the materials.

As the act in respect of which the damages are claimed was done by the 1st defendant in good faith, and in the discharge of his duties as Deputy Magistrate, he is protected by Act XVIII of 1850. I therefore pray that the plaintiff's claim may be dismissed, and he may be adjudged to pay the 1st defendant's costs.

The building referred to in the plaint is not worth so much as stated in the plaint."

The following is taken from the judgment of the Civil Judge:—

"The material facts of the case as set forth in the written and oral pleadings, appear to be these.

The defendant Ragunáda Rau, in his official capacity as 1st Class Deputy Magistrate of Trichinopoly, issued an order (Exhibit I), on the 9th August 1867, under Section 308 of the Criminal Procedure Code, to the plaintiff and his brothers, who are residents of Srírangam, requiring them to demolish their houses and remove the materials within 30 days, or to appear before him on the 15th idem and show cause why the said order should not be enforced, as he considered the houses to be a public nuisance.

On the 16th idem, the plaintiff put in a petition, Exhibit No. III, in which he protested firmly, but respect-

fully against the order in question, and pointed out that his house was no encroachment at all on the public thoroughfare; that it was neither a nuisance, an obstruction, nor dangerous; that it had stood there for several generations; that it was his own private property by right of purchase, and was worth at least Rupees 600; and that it did not come under the provisions of Section 308 of the Criminal Procedure Code. He further prayed that in case of the defendant's persisting in his determination to pull down his house, a sum of Rupees 700 might be given him to cover the value of the house, the cost of removing the materials, &c., and concluded by explaining as an apology for his having failed to state his objections on the 15th idem as required, that no office had been held on that or on the preceding day.

The defendant affirms that he made an endorsement the *same day* on the back of the said petition, to the effect that he was "not satisfied that sufficient cause had been shown to make it appear that his order (of the 9th August, Exhibit I) was not reasonable and proper"—referred plaintiff to Section 310 of the Criminal Procedure Code under which he might apply for a jury, intimated that on his either failing to do so, or to carry out the said order within the specified time, the matter would be disposed of under Section 311 of the Criminal Procedure Code, and he adds that a copy of the said extract was furnished to the plaintiff soon after, the original petition having been detained by defendant, but this is denied by plaintiff who asserts that he has never yet received a copy of such extract...... ....

Be that as it may, there is no question as to plaintiff's having on the 6th September 1867 instituted a suit, Original Suit No. 333 of 1867, against the defendant, on the file of the Trichinopoly District Munsif's Court, Exhibit E, by which he sought to establish his right to the terraced house, &c., in question, and to have the notice, Exhibit I, cancelled; and on the following day (7th September) he appeared before the District Munsif, and after presenting a petition, Exhibit Q, he made an affidavit, Exhibit P, in which he ear-

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nestly prayed for the issue of an injunction to restrain the defendant from knocking down his house on the following Monday the 9th idem, and attributed the action of the defendant to be due to malice on his part arising as he stated in Exhibit Q, out of the dispute between himself (plaintiff) and one Narasimmacharry, who is the 1st defendant in Original Suit No. 47 of 1869 on this Court's file, not yet disposed of...

It appears that for the reasons assigned in his letter of the 18th October 1867, and which letter is embodied in the Proceedings of Government, No. 2039 of the 11th December 1867, the District Munsif issued a notice under Section 95 of the Civil Procedure Code, restraining both parties (plaintiff and defendant) from interfering "in the demolition of the building." The defendant does not dispute the fact of the notice in question having been issued, and of his having been perfectly aware that a duplicate thereof had been affixed to the wall of the plaintiff's house, which he nevertheless pulled down, but as he has affirmed that he was not personally and therefore legally served with such notice, I have found it necessary to deal with the subject in paras. 23, 24 and 25 of this judgment.......................................

The defendant has never denied the factum of his having caused the plaintiff's house to be demolished, but in his written and oral pleadings he sought to justify the act by alleging that he did the plaintiff no legal injury; that he acted in good faith in the discharge of a public duty by removing what he believed to be a public nuisance and unlawful obstruction; that his proceedings were regular, and that therefore he is entitled to protection under Act XVIII of 1850; and that the value of the building has been overestimated.

The following issues were framed:—

1st. Whether, as affirmed by 1st defendant and denied by plaintiff, the house which forms the subject-matter of enquiry was an unlawful obstruction and nuisance within the

meaning and scope of Section 308 of the Criminal Procedure Code or not? 1871. April 17. May 8, 22. November 27. R. A. No. 116 of 1870.

2nd. Whether, as affirmed by 1st defendant and denied by plaintiff, the former acted in good faith and in the lawful discharge of a necessary public duty in ordering the removal of the plaintiff's house or not?

3rd. Whether, as affirmed by plaintiff and denied by 1st defendant, the plaintiff is entitled to the relief sought.

The examination of witnesses closed on the afternoon of Saturday, the 16th instant, and at the request of Counsel the further hearing of the case was adjourned to Monday, the 18th idem; meanwhile the Judgment of the High Court in the nearly parallel case *Regular Appeal No.* 7 *of* 1870(*a*) reached me, and on the respective Counsel becoming aware that the Honorable the Judges had found that the defendant had no jurisdiction to order the removal of the plaintiff's house in that case, and which adjoined the house which forms matter of present enquiry, the two cases being all but analogous, the question at issue being identical, they accepted the ruling in that case as conclusively settling the 1st issue in this case against the defendant, and I am glad to find that my own opinion on the subject was in perfect accord with that of the Honorable the Judges.

The case became thus narrowed down to a consideration of the 2nd issue, and of the measure, if any, of damages.

The plaintiff's documents are lettered A to X, and he examined eight witnesses.

The defendant's documents are numbered I to X, and he examined four witnesses.

I address myself, therefore, in the first place to a consideration of the 2nd issue, and I find that the Honorable the Judges in dealing with the nearly analogous case *Regular Appeal No. 7 of* 1870 held the defendant to be entitled to protection under the Act quoted for the reasons which are set forth in the judgment.

Without entertaining any diversity of opinion on that point, I think there are circumstances connected with the

(*a*) See 5 M. H. C. R. 345.

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defendant's action in this case, which were wanting in the other, and which debar him from the protection under Act XVIII of 1850, to which he might otherwise have been entitled. They are that in this case personal animosity has from the first been ascribed by plaintiff to defendant in his bearing towards him, and I think it has been established on strong *primâ facie* evidence; and secondly, I think that whereas it was held in *Regular Appeal No.* 7 *of* 1870 that there was not sufficient evidence of the defendant having obstinately pulled down the building in question after he had been served with a notice of application to a Civil Court for an injunction, the evidence to that important point in this case is complete."

[The Civil Judge then commented upon the evidence in the case. He continued,—]

"I am of opinion then, in regard to the 2nd issue, that the defendant is not entitled to protection under Act XVIII of 1850, because I find that he failed to exercise that due care and attention which he was bound to do before illegally and unnecessarily demolishing the plaintiff's house.

2ndly. Because after a careful consideration of all the circumstances connected with the present case, and of those relating to the contemporaneous magisterial proceedings out of which *Original Suit No.* 47 *of* 1867 has originated, I can attribute the defendant's removal of the plaintiff's house, under the specious and colourable pretext of its being an obstruction and nuisance, to no other cause than his personal animosity towards the plaintiff..................................

I endorse the sentiment which the Chief Justice Holt gave expression to in *Ashby* v. *White and others*, (I Sm. L. C. 129) where he declared that "If public officers will infringe men's rights, they ought to pay greater damages than other men, to deter and hinder other officers from the like offences."

I therefore enter judgment for plaintiff in the sum of Rupees 500."

The defendant appealed.

The Acting Advocate General (with him *Sanjiva Rau*) for the appellant. The Civil Judge says that the ruling of the High Court in *R. A. No.* 7 *of* 1870 was accepted as conclusively deciding the first issue in this case against the defendant. No doubt a Vakíl may make binding admissions, but the decision in *R. A. No.* 7 *of* 1870 went upon the ground that the building was not an encroachment and only an obstruction in the sense in which any house on private property in a narrow roadway is one. An admission which had no bearing on the conduct of the case, which had no bearing on the evidence taken in the case, and which, if made at all, was made on a misunderstanding of the decision in *No.* 7 *of* 1870, should not bind us in this Court. We did distinctly prove the house to be an encroachment. [He then read evidence, referred to in the judgments of the High Court, which he contended showed that the house was an encroachment.]

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Document No. 1 recites that the house was stated to be an obstruction, and thereupon the Magistrate based his finding, and we say that that finding and evidence is conclusive.

When the fact that creates jurisdiction is a fact that the Magistrate must find, and he finds it, you cannot examine into the grounds of his finding.

Brittain v. *Kinnaird,* 1 *B. & B.* 482.

[SCOTLAND, C. J. referred to *Gelen* v. *Hall,* 2 H. & N. 379.]

In this case the order recites the facts. If the Magistrate believes the evidence, even though it be evidence such, perhaps, as no other judge would believe, if he bonâ fide believes it, no action lies.

Mould v. *Williams,* 5 Q. B. 469.

In that case it was necessary to find, 1st that the timber was on the highway; 2nd, that it was a nuisance.

[HOLLOWAY, J.—Have you *Chapman* v. *Robinson,* 1 E. & E., which is quite to the contrary. If a Magistrate acted without jurisdiction, believing that he had jurisdiction, an action would not, perhaps, lie against him.] There was no allegation of malice in *Mould* v. *Williams.*

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I contend that when the conviction or finding recites the evidence upon which the finding is based, you cannot overturn the conviction. You cannot look behind the finding.

In *Reg.* v. *Bolton,* 1 Q. B. at p. 72, Lord Denman says, "All we can then do, when their decision is complained of, is to see that the case was one within their jurisdiction, and that their proceedings on the face of them are regular and according to law...[He read on to the passage at p. 75. ending] "we conclude, therefore, that the enquiry before us must be limited to this, whether the Magistrates had jurisdiction to inquire and determine, supposing the facts alleged in the information to be true: for it has not been contended that there was any irregularity on the face of their proceedings."

In England there is no Act corresponding to Act XVIII of 1850.

In *Griffith* v. *Harries,* 2 M. and W. at page 344, Baron Parke says, "The rule of law is established that if there be a conviction good on the face of it, the Justice is protected; if the conviction is bad on the face of it, then he is not protected. By the term "bad upon the face of it," I mean any conviction which shows a want of jurisdiction, or directs an imprisonment of a party, which the Magistrate is not entitled to award."

In *Penney* v. *Slade,* 5 Bing. N. C. 319, at page 329, Tindal, C. J. says, "The ground on which the charge was impugned for misdirection was this:—.........................
...... "Now this was a judgment confessedly wrong, entered up without any legal authority in any one to enter it, yet, as long as it remained unquashed on the files of a court which had a jurisdiction over the subject-matter, the Court could not treat it as a nullity" ...... [to the passage in page 331 ending] "We think, therefore, that it cannot be questioned in this collateral way on the ground of an irregularity or miscarriage, in ascertaining the sentiments of the meeting."

The powers possessed by the defendant, make him in this case, a Judge of record.

Kemp v. *Neville*, 31 L. J. C. P., Erle, C. J. at page 163, commenting on *Groenvelt* v. *Burwell*.

Even if he be not a Judge of a Court of record, that makes no difference. *LaMert's case*, 33 L. J. Q. B. 69.

Further, if the case were one in which affidavits were receivable for quashing the conviction, it does not follow that an action would lie.

Pease v. *Chaytor*, 32 L. J. M. C. Blackburn, J. at page 125.—"So that it is the duty of the Justices..............for the purpose of maintaining an action against the Judges of that Court."

Ex-parte Baker, 26 L. J. M. C.

Ashcroft v. *Bourne*, 3 B. and Ad. 684.

[HOLLOWAY, J. There is a case *Reg.* v. *Dayman*, 7 E. and B., which is greatly in your favor, and another case *Reg.* v. *Brown* in the same volume, which is as strong against you.]

When a Judicial act depends on a point in evidence, if the Magistrate finds that point on even a tittle of evidence, you cannot look behind it.

Again, the plaintiff should have given the Magistrate notice of the action. Neither upon the plaint nor in the issues are the questions of notice or want of reasonable and probable cause raised.

[SCOTLAND, C. J. Could the plaint have been rejected?]

No. And because it is a good plaint for some purposes,

[SCOTLAND, C. J. I do not see how you can introduce the difference betweeu 'case' and 'trespass' here.]

The system of pleading in this country compels you to disclose a cause of action on your plaint, and it prevents your going into any other cause. Now this plaint does not allege malice or want of reasonable and probable cause; nor are these points raised in the issues. The issues merely raised. (1.) Whether the Magistrate acted with jurisdic-

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tion. (2.) Whether, if not, he acted bonâ fide so as to be protected under Act XVIII of 1850.

Kendall v. *Wilkinson*, 24 L. J. M. C. 89: *Taylor* v. *Nesfield*, 23 L. J. M. C. 189.

Further, if want of reasonable and probable cause is set up, the conviction must be quashed before this can be shown.

Basébé v. *Matthews*, L. R. 2 C. P. 684.

[SCOTLAND, C. J. Does not that seem a very strong principle to introduce here?] 3 M. H. C. R. 238. This was before *Basébé* v. *Matthews*.

Chapter XX. of the Criminal Procedure Code says that "No suit shall lie in respect of anything necessarily or reasonably done to give effect to such order" (as that here complained of), and the Executive are already amply protected by Act XVIII of 1850.

4 Ben. L. R. Full Bench, 24: 4 Bom. H. C. A. C. 150. These decisions do not conflict. In the former case, the Magistrate had adopted the Procedure Code, and the Court said, "having done so, you are safe." In the other case, the Magistrate had not adopted the procedure provided by the Code. I submit that, in the present case, no action lies against the Magistrate.

[HOLLOWAY, J. I called your attention in the course of the argument to *Chapman* v. *Robinson*, 1 E. & E. 25, as to the difference between an obstruction of long standing and a recent one.]

There is no such distinction made by the Statute.

[HOLLOWAY, J. Nor by the Highway Act. On the same principle, the Lord Mayor of London might knock down St. Paul's Churchyard.]

There is nothing in the sections to limit the application of Cap. XX. to recent obstructions.

O'Sullivan and *Ráma Rau* for the respondent contended that the defendant was not protected by Act XVIII of 1850, and cited 3 Bom. H. C. A. C. 47, and the case (*Víthobá Malhárí* v. *Cornfield*) reported in the Appendix. Also 4 Ben. L. R. A. C. 37.

The Court delivered the following judgments. 1871.

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SCOTLAND, C. J.—This is a suit to recover damages from the defendant, the Deputy Magistrate of the zillah of Trichinopoly, for a trespass alleged to have been committed in execution of an order made by the defendant under Section 311 of the Criminal Procedure Code, directing the demolition of the plaintiff's house as being a nuisance to a public thoroughfare. The defendant by his written statement denied his liability, alleging in justification of his order that he believed the house to be obstructive to public comfort and proceeded in accordance with Sections 308, 310 and 311 of the Criminal Procedure Code, and that, having acted in good faith in the discharge of his duties as Deputy Magistrate, he was protected by Act XVIII of 1850. The suit came on for hearing in the Court below upon the issues—(1) whether the house was an obstruction and nuisance within Section 308 of the Criminal Procedure Code: (2) whether the defendant acted in good faith in the discharge of his public duty in ordering the removal of the house: (3) whether the plaintiff was entitled to the amount of damages claimed. At the hearing the Civil Court treated the decision of this Court in *Regular Appeal No.* 7 *of* 1870 (5 M. H. C. R. 345) as conclusive of the 1st issue, and thereupon held, without considering the effect of the evidence, that the defendant had no jurisdiction to order the removal of the house. On the 2nd issue the Civil Court came to the conclusion that circumstances were supplied by the evidence which were wanting in that case, and which showed that, in making the order for the demolition of the house, the defendant had not acted with due care and attention, but from feelings of personal animosity towards the plaintiff, and was therefore not protected by Act XVIII of 1850; and on the 3rd issue the Court assessed the damages to which the plaintiff was entitled at Rupees 500. From the decree adjudging that amount to be paid by the defendant with costs and six per cent. interest the present appeal has been brought.

The main ground of objection relied upon, on behalf of the appellant, is that no action lay against the defendant; and this objection involves two questions; first, whether it

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is shown that the defendant acted without jurisdiction in making the order for the demolition of the plaintiff's house under Chapter XX of the Criminal Procedure Code; secondly, if so, whether the defendant is proved to have acted, believing at the time in good faith that he had jurisdiction to make the order, and therefore entitled to the protection given by Act XVIII of 1850.

On the first question it was urged by the learned Advocate General for the appellant that the order showed jurisdiction on its face, and, never having been invalidated, it was an estoppel in the defendant's favor as to the facts therein found, and he referred in support of his contention to *Brittain* v. *Kinnaird,* 1 B. & B.; *The Queen* v. *Boulton,* 1 Q. B. 72; *Mould* v. *Williams,* 5 Q. B. 569; and, several other cases in the English Reports decided before the passing of 11 & 12 Vict. Cap. 44.

The dictum of Dallas, C. J. in *Brittain* v. *Kinnaird,* does undoubtedly go the whole length of supporting the absolute conclusiveness of the findings in a Magistrate's conviction or order, and there are observations of the Judges in some of the subsequent cases which seem to give full confirmation to that dictum. But I do not consider that the *decision* in any of the cases can be treated as an authority for that position. In my view, the effect of all the decisions is to establish that the findings of facts set forth in a conviction or order not open to an appeal cannot be controverted when such findings are judicial conclusions from evidence properly before the Magistrate, and therefore a conviction or order which showed jurisdiction by a finding of that nature and was otherwise good on its face, afforded a complete protection to the Magistrate making it against an action of trespass. They do not, it appears to me, determine more than this; and are not, therefore, any authority for the operation of a finding of a fact essential to jurisdiction as an estoppel, when the conviction is sought to be invalidated upon the ground that there was no evidence in support of such fact before the Magistrate. A conviction, it is true, does now operate as an estoppel in England, even in such a case, but

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that has been effected by the enactment in 11 & 12 Vict. Cap. 44, Section 2, providing that no action for an act done under a conviction or order made without, or in excess of, jurisdiction, shall be brought until after the conviction or order has been quashed; and the more recent decisions in England show that the entire absence of evidence of the facts essential to give jurisdiction is a good ground for annulling a conviction or order. In my opinion, therefore, before the passing of 11 & 12 Vict. Cap. 44, the decisions in the English cases had not established that a conviction showing jurisdiction on its face was conclusive in an action against the Magistrate for an act done under it, when the ground of action was the entire absence of evidence as to the facts essential to give jurisdiction; and it has never, that I am aware, been judicially considered as an estoppel in this country. There are several reasons in favor of the expediency of making the right of action against a Magistrate for acting without, or in excess of, jurisdiction, conditional upon the quashing of the conviction or order on appeal, or revision; but, in the absence of legislative enactment, this Court cannot now impose such a condition.

But supposing my opinion on this point to be wrong, the contention for the appellant fails on another ground. It was assumed throughout the argument that jurisdiction is shown on the face of the defendant's order, but a reference to the order has shown the assumption not to be well founded. The jurisdiction to make the order under Cap. XX of the Code of Criminal Procedure depended upon the house being an unlawful obstruction or nuisance; now as there was nothing offensive in the use which the defendant made of the house, the only ground upon which the jurisdiction could attach was its being upon, or projecting over, a part of a public thoroughfare or place. The order does not contain any statement to that effect. The whole purport of it is, that the house on the occasions of festivals was inconveniently in the way of the passage of a large assemblage of persons along the open space of ground adjoining it, and was therefore considered a removable nuisance. It is, obviously, quite consistent with this that the house stood upon and did not

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project beyond land which was private property; and if so it was not, by reason of the alleged inconvenience, unlawfully either an obstruction, or nuisance, within the meaning of Chapter XX of the Code of Criminal Procedure.

It follows that as the order does not show jurisdiction on its face, and is, on that ground, not available as a conclusive defence to the action, the point in regard to the absence of jurisdiction is left to be determined upon the evidence in the record, just as if the order had been quashed before action. And here, I think, the question for determination is whether there was any evidence tending to show that the house was an unlawful obstruction. If so, the defendant was not, I think, liable, for a Magistrate being bound to consider and decide upon the effect of the evidence before him as to the facts essential to give jurisdiction, an unsound conclusion formed fairly from such evidence is but an error of judgment in the exercise of jurisdiction; and it would be unjust to hold him liable as a trespasser for an act done under a conviction founded upon his erroneous conclusion, upon the ground of want or excess of jurisdiction. In such a case absence of reasonable or probable cause and malice are, I think, essential to a cause of action. See *Calder* v. *Halket*, 3 Moo. P. C. C. 28, 77; *Cave* v. *Mountain*, 1 M. & G. 257; *Pease* v. *Chaytor*, 3 B. & S. 621.

Then as to the effect of the evidence. There appears to me to be an utter absence of any evidence of unlawful obstruction or nuisance, but some strong evidence to the contrary. There is distinct evidence of the defendant's witnesses, supporting the statement in the order, to the effect that the house was an obstruction to the convenient passage of people at festivals while the idol was being carried in procession outside the pagoda compound, but not a particle of evidence beyond this upon the point of obstruction, except that of the 1st witness, the Karnam of Srírangam, who stated positively that the place where the house stood was not a public road, and the facts deposed to on both sides that a house stood upon the spot for many years, and that not far from it there were elephant stalls kept up until recently. Two witnesses appear to have spoken to the

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house being an encroachment on the public road, but merely from guess and because they heard that gentlemen who inspected the place pronounced the house to be an impediment. Finding no evidence of unlawful obstruction or nuisance for the defendant's consideration, I am of opinion that an entire absence of jurisdiction to make the order has been shown.

It becomes necessary, then, to determine the 2nd question, whether the defendant is protected by Act XVIII of 1850. He no doubt acted judicially in making the order. *Seshaiyangar* v. *Ragunátha Rau* (5 M. H. C. R. 345). The point to be considered is, did he at the time "in good faith believe himself to have jurisdiction" to order the removal of the house ? To satisfy this provision, a groundless belief formed from ignorance, or rashness, is plainly not sufficient. The belief must be entertained "in good faith," and those words were meant, I think, to require an honest persuasion founded, after fair enquiry and consideration, upon what might mistakenly, either in point of law, or fact, be considered a reasonable or probable ground, by a person possessing ordinary qualifications for the office held by the Magistrate sought to be made liable. The belief must appear to have been trustworthy to his mind. That is my understanding of the import of the words "good faith," and a belief cannot be said to have the quality of trustworthiness unless it rested upon some ground which might be thought a reasonable or probable foundation for it in the judgment of a man of ordinary capacities. No construction short of this would, in my opinion, give due effect to the simplest meaning of the words. In arriving at this opinion, I have had present to my mind the decisions of the Courts in England in *Pease* v. *Chaytor*,(a) *Douglas* v. *Corbett* (6 Ell. & Bl. 514), and other cases bearing on this point. The distinction which has been laid down in England, excluding absolutely the consideration of a mistaken view of the application of the law as any reasonable ground for a judicial conclusion (see *Boulden* v. *Smith*, 14 Q. B. 852) is not one that can, I think, be followed here. I do not see a reason for the distinction, except in the forced maxim that every man is supposed to know the

(a) 3 B. & S. 621.

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law, and therefore a misconstruction of it is inexcusable; and the rigid application of that principle to Magistrates in the country generally, would throw upon them an extremely hard and vexatious responsibility. However, I rest the inapplicability of the distinction upon the construction of the Act under consideration. The enactment is quite general, and when a provision of the law is fairly open to misapprehension by a Magistrate, his belief, formed upon a misapplication of it to the facts of a case, appears to me to be, equally with a wrong conclusion of fact drawn from some reasonable or probable cause, a belief formed in good faith.

Upon this view of the construction of the Act, I proceed to consider whether the circumstances in the record bring the defendant within its protection. Being of opinion, for the reasons already stated, that there was nothing in evidence before him which went to show more than that the house was an annoyance to a certain number of persons, because objectionably in the way on the occasions of festival processions; and that that kind of annoyance alone did not render it an unlawful obstruction, or nuisance; it follows, that the facts of the case furnished no reasonable or probable ground for belief in the existence of jurisdiction by a Magistrate of ordinary qualifications; and the defendant must, therefore, in my opinion, be held not to have entertained that belief in good faith, unless the provisions of the Code of Criminal Procedure, under which he acted, admit of the view that he might not unreasonably think that it was probably intended to apply to such an annoyance as that complained of.

That he did believe firmly that the law gave him jurisdiction, I have no reason to doubt, and will only add, on this point, that my remarks in the former case reported in page 345 of 5 M. H. C. R. as to his motives and mode of proceeding apply here. Then might he reasonably so misapprehend the law? After a good deal of hesitation, my opinion is that he might. The Code of Criminal Procedure gives no definition of the term "nuisance," but it is defined in the Penal Code, Sec. 269, and looking at the provisions of

that section and Sections 62, 63 of the Code of Criminal Procedure, I am unable to hold that the defendant could not reasonably believe that the bare objectionableness of the house to a number of persons assembled at the Pagoda festivals was an annoyance to people generally, such as to amount to a common nuisance within the operation of Chapter XX of the Code of Criminal Procedure. It seems to me that the provisions were open to such a misunderstanding and misapplication by a Magistrate of ordinary qualifications. Upon this ground, I think that sufficient reasonable cause to support the good faith of the defendant's belief is shown, and that he is therefore protected by the Act from liability in the suit; although in the circumstances of the case, I think no temperate Magistrate, uninfluenced by the personal motives alluded to in my former judgment, would have acted so precipitately and harshly upon such a belief.

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The decree must be reversed and the suit dismissed, but I think the defendants should not be allowed costs in this or the Lower Court.

HOLLOWAY, J.—In this case the Advocate General in his elaborate argument said nothing upon the construction of the section. I fully considered it in the former case, and I will only add to what I said at 5 M. H. C. 357, *et seq.*, that a prudent Magistrate ought not to act upon these summary powers, even if all the requisites to the jurisdiction exist, unless the obstruction is recent. Otherwise there is scarcely a town of any size in which half the buildings might not be pulled down or reduced. Although *Chapman* v. *Robinson* (1 E. & E. 25) professes to be a construction of a section of the Highway Act, yet the ground of that construction points very clearly to a distinction between determining in summary proceedings that a building is an encroachment on a highway, and determining the same question in the formal proceeding by indictment.

The Advocate General's second argument was, that the order itself being an adjudication upon a matter of fact within his jurisdiction, the order itself was conclusive evi-

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dence of the existence of that fact, and that evidence to show the contrary was not admissible. For this, of course, *Brittain* v. *Kinnaird* (1 B. & B. 482) is the authority. I shall for the present purpose assume tha tthis is an authority which ought to bind us, and will apply it to the order in the present case. The Chief Justice says that the principle of all the ancient and all the modern cases is "that a conviction by a Magistrate, who has jurisdiction over the subject-matter, is, if no defects appear upon the face of it, conclusive evidence of the facts stated in it." What the conviction required, even after a Statute alleviating the difficulties of Justices, is to be found at Chitty's *General Practice of the Law* (II. 197.) Among them was the statement of the evidence as nearly as possible in the words of the witnesses, and Chitty proceeds—"If the evidence stated upon the face of the conviction be such, that no reasonable person could draw from it the conclusion of guilty, then the conviction would be invalid, but if there be any evidence that might upon the trial of an action have been left to the jury, then the conclusion of guilty drawn by the Justice cannot be vacated or disturbed."

Now the order upon its face does not find that these buildings were in a thoroughfare or public place at all. There is one loose expression "that there were obstructions as well as temporary huts raised against the pagoda walls *in* the thoroughfare." Even, however, this loose expression is not derived from evidence but from inspection. Where the evidence is recited there is a great deal of matter about sanitary inconveniences, diminishing of space, &c., but not one word to show that the buildings were upon either a thoroughfare or a public place, and they must be there to be removed from them. If the evidence had been set out in the conviction, as at the time of *Brittain* v. *Kinnaird* a long course of judicial decisions, unauthorized by any Statute, required, this would have become still more apparent.

Ragunáda Rau, one of the witnesses, upon whose statement the order professes to be based, and, as Karnam for 10 years, presumably the person best acquainted with the matter, distinctly says that the place upon which the house was

situated is not a public road. He, of course, says that it was an inconvenience to the people who collected in what was the public road.

The 3rd witness, one of the pagoda people, says that it was knocked down because it was a little in the street, and that it projected 10 or 12 feet beyond the Goparam on the street side.

The 2nd witness says that it projected 4 feet beyond the tower and was an obstruction to the people.

All the evidence on both sides shows that the houses have existed for some years and that there were buildings there before. It is probable that on the re-building the house was a little extended towards the street.

Now I say that there is here no finding of the fact necessary to give jurisdiction, and that, if the evidence were incorporated, there is nothing for a judge to leave to the jury, that the building was in a thoroughfare or public place.

The evidence of the 3rd witness for the defence is a mere particle of evidence, so far as his assertion goes, but he derives his opinion from its being 10 or 12 feet beyond the Goparam. It being within the Goparam would be very cogent evidence that it was not in the street, but its projecting 12 feet, as 3rd witness says, or 4 feet, as 2nd witness for defendant says, beyond it, would not be the slightest evidence that it was upon the street.

The mere assertion of 3rd witness, worthless as it is, and contradicted as it is by the principal witness for the defence, would still show that the removal of the whole of the house was unjustifiable and the act done a trespass for the excess. I adopt without hesitation the observation of Wightman, J. (3 B. & S. 633) "There is some difficulty in distinguishing between no jurisdiction and excess of jurisdiction: as soon as a Justice exceeds his jurisdiction he is without jurisdiction." I come to the conclusion that this order, with the evidence on which it is based, is absolutely bad; that the act of the Deputy Magistrate was without jurisdiction; and that his only defence to this action is the plea, if sustainable, that he in good faith believed that he had jurisdiction.

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I am bound to observe that the observations of the Civil Judge, as to the conduct of the Deputy Magistrate being animated by motives of express malice and private revenge, are not justified by any thing in the evidence, and it is much to be regretted that he should have made such observations. Up to this point I have never entertained the least doubt. The act of the defendant was clearly without jurisdiction. His own order does not assert it, and the evidence recited and that given in the suit show conclusively that there was none. If the case, therefore, were governed by English law, it would be a trespass, and this is one of those private delicts in which the external act itself, without any reference to the consciousness of the actor that he was committing an injury, gives a title to compensation. There is another class to which that consciousness is essential and where error is important as excluding the supposition of *dolus*. The demands arising from such private delicts are, in English law, enforced by actions upon the case. In this country, however, the matter is altered by the enactment of Act XVIII of 1850, which, adopting Mr. Baron Parke's second but rejected construction of the older statute (See 2 M. H. C. R. 397 & 3 Moo. P. C. 74), within certain limits protects persons acting judicially against the consequences of acts done without jurisdiction. To render the defence applicable the act must have been done judicially, and at the time of ordering or doing the act complained of, the actor must have believed that he had jurisdiction to do or order it.

If we were to apply technical strictness to the language of this defence, it would probably not raise the question, for there is no allegation that, at the time of making the order, he in good faith believed himself to have jurisdiction to make it. The same reason, however, which would, if it had been necessary to consider the point, have led me to think the action maintainable, although the absence of reasonable and probable cause and malice is not alleged in the plaint, lead me to treat the defence as if it pleaded the Statute and the matters necessary to excuse according to its provisions. It will be seen that the language of the Act requires the Court to come to the affirmative conclusion that there was

a belief and, in form at all events, seems less favorable to a defendant than the law in actions on the case, in which the *malus animus* of the defendant is one of the ingredients of the plaintiff's case. The very appeal to such a defence, of necessity implies a legal error to be excused, or its consequences to be palliated or removed, for he who acts in pursuance of the law needs no defence to an action. The defence depends upon the existence of a particular state of mind. As the most acute introspection will often fail to satisfy the actor himself as to the state of mind which preceded and was the motive spring of a particular act, it is manifest that, as in so many other cases involving the most serious consequences, the conclusion of a human tribunal upon such a matter will, of necessity, be liable to still greater error. Being bound, however, to come to a conclusion, it must do so by a deduction from the external act, together with all its attendant circumstances, and before applying the principles which I conceive to govern the present case, I will, as shortly as I can, discuss the idea of good faith as it has been conceived by the lawyers who have gone before us. The Romans used it as the antithesis of fraud and dolus. "Fides bona contraria est fraudi et dolo." He was a buyer in good faith who was ignorant that the thing was another's, or thought that the seller had a right to sell (C. 109 de v. s.) (So Lord Stowell, 2 Dod. 389).

The plea of bonâ fide purchase for valuable consideration without notice is an example in English law. The words "without notice" are perhaps redundant, for the notice has been held sufficient evidence of *mala fides* to justify the practical repeal of an Act of Parliament (*Le Neve* v. *Le Neve*).

The inference of malice is in civil cases a question of fact, and the mere absence of reasonable and probable cause for an act does not justify the concluding as matter of law that the act is malicious (See *Bromage* v. *Prosser*, 4 B. and C., 256; *Mitchell* v. *Jenkins*, 5 B. and Ad. 588). In this latter case, that eminent lawyer, Taunton, J., admitted his error in laying down the contrary. The cases upon certain

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acts, requiring notice of action if a man has acted in pursuance of certain Acts of Parliament, are remarkably conflicting. One group, of which *Hughes* v. *Buckland* (15 M. & W. 356) is the principal, requires that the belief must not only be an honest belief, but must be based upon reasonable grounds. Another group, of which *Booth* v. *Clive* (10 C. B. 827), and *Read* v. *Coker* (13 C. B. 850) are the principal [See too *Hermann* v. *Seneschal*, 13 C. B. N. S. 392; *Roberts* v. *Orchard*, 2 H. & C. 769], and *Chamberlain* v. *King*, L. R. 6 C. P. 474, decides that there must be an honest belief and some facts upon which it is to rest, but that the belief need not be reasonable. This case has got rid again of the apparent conflict of *Leete* v. *Hart* (L. R. 3 C. P. 322) with this latter group of cases, and the doctrine at present prevailing is that there may be an honest belief without reasonable grounds for it. In giving judgment in the former case (5 M. H. C. R. 345) I assumed this as the law, and simply asked myself as a judge of fact whether I thought that he believed in good faith, although altogether without reason, and I considered that he did. If I had expanded my judgment on the point, I should have said that his course of conduct was that of a man quite certain of his law, proud of his authorities, which were really irrelevant, rather courting an examination of his proceedings, and so certain of them that he did not hesitate to flaunt them in the face of the Courts which were seeking to question them. Admitting as I do that the nature and character of the blunder are elements in determining whether there was a belief in good faith, the fact that the Civil Judge, who had himself been for many years a Magistrate, propounded the same legal blunder in even a balder and broader form, would have prevented me from coming to the conclusion that it was impossible for a man honestly to believe in the existence of a jurisdiction of which the absence was patent when the legal meanings of "thoroughfare," "public place," and "nuisance" were understood. No instruction on this matter can be derived from the definition of belief in good faith contained in the Penal Code. The precepts of penal law, as of all branches of public law, are more stringent than those of private. It is manifestly the duty of the citizen, not only not to infringe it, but not

to evade the mental effort necessary, and which he is bound to use, for seeing that the facts which are to constitute an exception really exist. Actions for malicious prosecution are another example that the emotion of mind called malice, *dolus*, or *mala fides*, is something different from the absence of reasonable and probable cause. This is peculiarly conspicuous, for by a course of English decisions, the existence of reasonable and probable cause is a question of law for the judge, while the malice is for the jury and, therefore, a question of fact (see *Lister* v. *Prettyman,* L. R. 4 H. L. 521).

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It seems to me that these are the principles to be applied to the present defence. The act may be unreasonable, marked by rashness, but it may still have been done under an error consistent with good faith. The error may consist in mistaking the import of a legal rule—a pure error of law; a mistaking of the facts—a pure error of fact; or a wrongful subsumption of the facts to the rule—sometimes the one and sometimes the other.

The course of reasoning on which the defendant proceeded is,—" The land on which the house stands belongs to the pagoda, therefore the occupation of it is a wrong. The effect of that wrong is to deprive a large number of people of a free space which they would have, if it were removed. The depriving them of that free space is an annoyance to them and being an annoyance to a large number it is a nuisance." The defects of the reasoning are, of course, patent.

There was no obstruction, unless it was already a public place or a thoroughfare, and the thing itself was not in its nature a nuisance. Either would have justified, but the result was arrived at by mixing in the mind a portion of each, and each was without one of the essentials. To a mind accustomed to logical or jural analysis, the fallacy is patent, but I am satisfied that this defendant thought the fallacious reasoning quite inexpugnable. I quite agree that there is a negligence from which bad faith ought generally to be inferred (6 M. H. C. R. 88) and that it must generally be inferred where there is gross negligence (lata culpa). " Lata " culpa est nimia negligentia, i. e., non intelligere quod

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"omnes intelligunt." Now the measure of intelligence must be settled, and when we find in a case of precisely the same character that a Magistrate (then accidentally a Judge), of many more years' experience than this defendant, was misled by precisely the same process of reasoning, it seems to me impossible to say that the error arises from a negligence so great as to justify the drawing of that inference. I am satisfied that the error actually existed; that so far as the belief in his jurisdiction is concerned, he acted in good faith; and being so satisfied, on his conduct as a whole, I am of opinion that the decrees below must be reversed, but that there should be no costs.

It would have been more easy to have given reasons for a contrary conclusion, if my mind had been able to reach it. The case was one upon this point of very great difficulty, and has been repeatedly discussed before our minds could be brought to a satisfactory conclusion. An inference of this sort depends upon the impression made by a number of minute points which it is difficult to formulate, while to lay down broadly that wherever there is not what a Court regards as reasonable ground for an error, there cannot be good faith, is a much easier process, but not in my judgment consistent with the law.

Such an apparently objective standard would really be as purely subjective, and with less reason than one which takes into account the quality of mind of the particular actor. A blunder on a point of law which would be inconceivable to an Eldon has often been committed by persons in as high place. The true principle, in my judgment, is to treat each case on its own circumstances. If the blunder is very gross, there will be a very strong ground for saying that the defence is not made out, but still there may be grounds, on a view of the conduct of the blunderer, for saying that although the blunder is very gross it was unquestionably fallen into by an error in good faith. Such a defence, I need not say, would hardly avail any future Magistrate who undertakes to improve the communications or the health of cities by acts such as those in question in this case.

Appellate Jurisdiction. (a)

Special Appeal No. 460 *of* 1871.

NARASIMMA CHA'RIA'R and 11 others.*Special Appellants.*

SRI' KRISTNA TATA CHA'RIA'R... ...*Spl. Respondents.*

The plaintiffs, members of the Tengalai sect of Brahmins, sued the defendants, the trustees of a temple at Conjeveram, for the recovery of the money value of certain holy cakes which they alleged they were entitled to receive from the defendants for commencing the recital of a Sanscrit verse and reading a certain Tamil chant, which offices they (plaintiffs) had the hereditary right of performing in the said temple. The Munsif decreed in favor of some of the plaintiffs. The defendants appealed. The Civil Judge dismissed the suit, on the ground that the question incidentally involved was one of a religious character. *Held*, that the Civil Judge was wrong; that the claim was for a specific pecuniary benefit, to which plaintiffs declared themselves entitled on condition of reciting certain hymns; and that, undoubtedly, the right to such benefits is a question which the Courts are bound to entertain.

1871. *December* 15. *S. A. No.* 460 *of* 1871.

THIS was a Special Appeal against the decision of E. B. Foord, the Civil Judge of Chingleput, in Regular Appeals Nos. 77 and 84 of 1869, reversing the decree of the Court of the District Munsif of Trivellúr in Original Suit No. 66 of 1865.

The facts sufficiently appear in the following judgment of the Civil Judge.

"The plaintiffs, 93 in number, who are members of the Tengalai sect of Brahmins, sued the defendants, who are trustees of the temple of Srí Dévarájasámi at Conjeveram, for the recovery of Rs. 167-3-8, being the money value of certain holy cakes which they alleged they were entitled to receive from the defendants for commencing the recital of a Sanscrit verse called "Srí Shailadáyapatram" and reading the Tamil chant called "Prabandum," which offices they had the hereditary right of performing in the said temple.

The defendants pleaded that the plaintiffs had no right to commence the recital of the said verse and chant, and had therefore no claim to receive the holy cakes in question. They further pleaded that as the suit was of a purely religious nature, the Munsif's Court had no jurisdiction in the matter.

(a) Present:—Morgan, C. J. and Holloway, J.

1871. *December* 15. *S. A. No.* 460 *of* 1871.

The District Munsif was of opinion that the 1st, 2nd, 4th, 5th, 9th, 24th, 28th, 38th, 46th, 76th, and 79th plaintiffs were entitled to perform the duties in question, and awarded them Rs. 57-5-9 in satisfaction of their claim. He disallowed the claim of the remaining plaintiffs.

Both parties appealed against this decision. The plaintiffs on the ground that they were all equally entitled to recover the whole amount claimed, and the 2nd defendant because the Munsif decided against the evidence.

At the hearing, the 2nd defendant's pleader urged that the suit was not cognizable by the Civil Court, as it relates to matters of religious ceremonial, and he cites *Regular Appeal No.* 12 *of* 1862 (1 M. H. C. R. 301) in support of his argument.

The plaintiff's pleader argues that the Civil Courts have jurisdiction in the case, and cites *Special Appeal No.* 619 *of* 1868 (4 M. H. C. R. 349).

On referring to the reports of the above suits, I am of opinion that the former decision is applicable to the present case.

In order to find the plaintiffs entitled to the sum claimed as the money value of the holy cakes which they say the defendants are bound to give them, I must decide that the plaintiffs have the right of commencing the recital of the verse and chant for which the said cakes are given, that is, I must adjudicate a question of religious ceremonial and devotional observance in a Hindu temple. This seems to me to be a matter relating to the internal economy and management of the temple which the Civil Courts cannot take cognizance of.

Being, therefore, of opinion that the subject-matter of this suit is not of such a nature as to entitle the plaintiffs to maintain a civil suit, I shall reverse the decision of the District Munsif, and dismiss the suit with all costs."

The plaintiffs who had been successful in the Munsif's Court preferred a special appeal against the decree of the Civil Judge, upon the ground, among others, that the Civil Courts had jurisdiction to entertain the suit.

Párthasáradhi A'yyangár and *Ráma Rau* for the special appellants, the 1st, 4th, 5th, 7th, 11th, 24th, 37th, 38th, 39th, 44th and 51st plaintiffs, and 3rd plaintiff's legal representative.

1871. *December* 15. *S. A. No.* 460 *of* 1871.

The Court delivered the following

JUDGMENT:—In this case the Civil Judge has dismissed the suit on the ground that the question incidentally involved is one of a religious character. We are wholly unable to see how this view can be sustained. The claim is for a specific pecuniary benefit to which plaintiffs declare themselves entitled on condition of reciting certain hymns.

There can exist no doubt that the right to such benefits is a question which the Courts are bound to entertain, and cannot cease to be such a question because claimed on account of some service connected with religion.

If to determine the right to such pecuniary benefit, it becomes necessary to determine, incidentally, the right to perform certain religious services, we know of no principle which would exonerate the Court from considering and deciding the point. In so deciding we conceive that we do not touch any of the cases which have been referred to. With these observations we reverse the decree of the Civil Judge and remand the case for decision on the merits.

Suit remanded.

Appellate Jurisdiction. (a)

Special Appeal No. 275 *of* 1871.

SHERIF SAIB ... ...*Special Appellant.*

U'SANABI'BI AMMA'L and another...*Special Respondents.*

Suit by a Muhammadan female against her husband for maintenance. Defendant pleaded that he had divorced the plaintiff on the 8th January 1862. Both the Lower Courts found that no divorce had taken place upon the following facts:—Defendant went to Trichinopoly, leaving his wife at Tinnevelly. While at Trichinopoly he received letters from Tinnevelly informing him that his wife was leading an immoral life. He thereupon went before the Town Kázi of Trichinopóly, made a written declaration in the shape of a letter to plaintiff to the effect that he had divorced her, and repeated the divorce three times *successively* before the Town Kázi of Trichinopoly. Defendant directed also that the letter of divorce should be sent to the plaintiff, but there was no evidence of her having received it. *Held*, upon Special Appeal, that it was clear upon the authorities that there had been a valid divorce. The compressing the expression of the intention into one sentence seems, on the authorities, not to affect the legality of the repudiation, although some doctors consider the process immoral.

1871. *December* 18. *S. A. No.* 275 *of* 1871.

THIS was a special appeal against the decision of T. V. Ponnusámi Pillai, the Acting Additional Principal Sadr Amín of Tinnevelly, in Regular Appeal No. 386 of 1868, modifying the decree of the Court of the District Munsif of Tinnevelly in Original Suit No. 186 of 1867.

The suit was brought by 1st plaintiff against her husband, the defendant, to recover Rupees 500, being arrears of maintenance for five years due to her and her unmarried daughter, the 2nd plaintiff (a minor), and to establish their right to maintenance in future at the rate of Rupees 214 per annum, as well as for possession of a house valued at Rupees 86.

Defendant pleaded that 1st plaintiff had been divorced by him on the 8th January 1862; that he was not the father of the 2nd plaintiff; and that they were, therefore, not entitled to maintenance. The parties were Muhammadans.

The Munsif found that there was no legal divorce between 1st plaintiff and defendant, and gave judgment for plaintiff for the house, and for Rupees 480, arrears of maintenance, and for a future maintenance at the rate of Rupees 60 per annum to 1st plaintiff till a legal divorce might take

(a) Present :—Holloway and Kindersley, J. J.

place, and Rupees 36 to 2nd plaintiff till she should be married and removed by her husband to his house. 1871. December 18. S. A. No. 275 of 1871.

The defendant appealed. The Principal Sadr Amín, in modifying the original decree, delivered a judgment from which the following passages are taken :—

"The parties to this suit are Muhammadans, and the questions for determination, therefore, are, 1st, whether 1st plaintiff has been legally divorced by defendant, and 2nd, whether defendant is not the father of the 2nd plaintiff.

"The defendant affirms that he married 1st plaintiff in the month of August 1860, and discovering her infidelity towards him some four months after marriage, took her away from the town to a village which belonged to him, and lived there with her for some months, when 1st plaintiff insisted upon going back to the town to see her mother, notwithstanding his repeated advice not to do so; that he accordingly sent her away to her mother's house, and sometime afterwards went to Trichinopoly to get himself re-married, where he received several letters from his relatives and friends at Tinnevelly, informing him that 1st plaintiff has resumed her bad conduct; that he immediately appeared before the Town Kázi of Trichinopoly, and made a written declaration before him that he had divorced 1st plaintiff, and got that declaration to be sent to her by the said Kázi on the 8th January 1862 through the Kázi of the town of Tinnevelly, and that 1st plaintiff is not, therefore, entitled to maintenance.

"Unchastity does not appear to be a ground for divorce in Muhammadan law. The law authorizes a husband to divorce his wife without any misbehaviour on her part, and without assigning any cause, but it says to render a divorce complete, "it must be repeated three times, and between each time the period of one month must have intervened, and in the interval he may take her back either in an expressed or implied manner" (Macnaghten's Muhammadan Law, 3rd edition, page 60).

"Here the statement of the defendant and the evidence of his 3rd, 4th, and 5th witnesses go to show that defendant

1871. December 18. S. A. No. 275 of 1871.

made a written declaration in the shape of a letter addressed to 1st plaintiff, that he had divorced her and repeated the divorce three times *successively* before the Town Kázi of Trichinopoly, and got the letter to be sent to 1st plaintiff, who was residing at Tinnevelly, through the Kázi of that town, on the 8th January 1862. There is no evidence that 1st plaintiff received the letter, or that the contents thereof were communicated to her in any way. The only witness who was cited by defendant to prove this point is his 6th witness, the Tinnevelly Town Kázi, and he affirms that he did not deliver the letter to 1st plaintiff, but he did so to her sister's husband, her 3rd witness, and this witness denies having received any such communication; but granting that the declaration above alluded to must have reached the ears of the 1st plaintiff, and that it should count for one of the three repetitions of divorce required by law, it remains to see whether there have been two subsequent repetitions, as alleged by defendant in one of the grounds of appeal, to render the divorce in question valid. Defendant contends that the expression of the divorce in the written statement put in by him in this case is equivalent to the second repetition, and the expression of the same thing over again in his petition to the Lower Court, dated 5th August 1868, has answered for the third repetition; but I do not think that the expression of the first declaration of divorce, how often it may have been made in this suit, in which the divorce itself is contested, would amount to anything of the kind.

Under these circumstances, I find that no divorce has as yet taken place, and that first plaintiff is entitled to maintenance."

The defendant preferred a special appeal on the ground that the divorce was a valid divorce under the Muhammadan Law.

Scharlieb for the special appellant, the defendant.

Sanjiva Rau for the 1st special respondent, the 1st plaintiff.

The Court delivered the following

1871. December 18. S. A. No. 275 of 1871.

JUDGMENT:—It seems clear upon the authorities that there was a valid divorce. The compressing the expression of the intention into one sentence seems, on the authorities, not to affect the legality of the repudiation, although some doctors consider the process immoral (Baillie, 207). In the present case, every presumption exists in favor of the regularity from the transaction taking place before the qualified doctor of the Muhammadan law. We must reverse the decree of the Lower Courts. There will be no costs throughout.

Original Jurisdiction. (a)

Original Suit No. 68 *of* 1867.

H. H. A'ZI'M U'NNISSA BE'GUM

against

CLEMENT DALE, ESQ., Receiver of the Carnatic Property.

Plaintiff, the Nicka wife of the late Nawab of the Carnatic, sued for a declaration of her absolute title to certain premises (Nos. 1, 2, 3 and 4); for possession of certain other premises (Nos. 5 & 6); for delivery to her by defendant of the title deeds of all the premises except No. 1; and for cancellation and delivery up of a Sheriff's Bill of Sale of No. 1 in favor of T. A.; of a mortgage of Nos. 2, 5 & 6 to R. & Co.; of a mortgage of No. 4 to A. A.; and of all assignments by T. A., R. & Co., or A. A. to defendant. She claimed this relief under an alleged gift to her by the late Nawab on or about the 6th January 1851. Defendant said (and it was so found) as to Nos. 2, 5 and 6,—that he had never had anything to do with the said premises or with the title-deeds thereof. As to the other premises, that the several assignments in his possession were made to him as Receiver of the Carnatic property, under Act XXX of 1858, but that he had not obtained possession of the said premises nor of any of the title deeds thereof, except the Sheriff's Bill of sale of the 29th November 1855. Issues were settled raising the following questions.—Whether the gift was made as alleged? Whether, if so, it was valid against creditors of, or subsequent purchasers for valuable consideration from, the donor? Whether the gift was revocable—and revoked? Whether defendant has, or ever had, possession of all or any of the title deeds of Nos. 2, 5 and 6? And lastly, Whether plaintiff's claim was either wholly or in part barred by Act XIV of 1859? *Held*, that a complete gift had been made and not revoked. That it was valid against the creditors of the donor and also (as the donor and donee were both Muhammadans) against subsequent purchasers for valuable consideration from the donor. But that defendant had never had possession of the title deeds of Nos. 2, 5 & 6, so that the suit could not be maintained as regards them; and that it was barred, as to Nos. 1, 3 and 4, by Sec. 1, Cl. 16 of Act XIV of 1859.

Under Muhammadan Law "in the instance of a wife who may give a house to her husband the gift will be good, although she continue to occupy it along with her husband and keep all her property therein,

(a) Present:—Bittleston, J.

because the wife and her property are both in the legal possession of the husband. So also, it has been held by some that if a father transfer his house to his minor son, himself continuing to occupy it and to keep his property therein, the gift is valid; on the principle that the father in retaining possession is acting as agent for his son, according to which doctrine his possession is equivalent to that of his son." Reason requires that the same principle should be applied to the case of a gift by husband to wife. The wife may, according to Muhammadan Law, hold property independent of her husband, and as a husband may make a valid gift to his wife, it can only be necessary that the gift should be accompanied with such a change of possession as the subject is capable of, and as is consistent with the continuance of the relation of husband and wife.

1868. *March* 5, 6, 10. *April* 15.

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THE relief sought for by the plaintiff was a declaration of her absolute right and title to the following premises. (1) Rushkairam, or Wood's Garden, on the Mount Road, Madras. (2) U'mdah Bagh, or Maclean's Garden, on the Mount Road. (3) Mahbúb Bagh, or Turnbull's Garden, in the village of Adyar, including a parcel of land in Mowbray's Road. (4) Ghaus Bagh, in Nungumbaukum. And for possession of the premises.—Farah Bagh, or Dare's House, at Ennore, and Ahmed Bagh, or Farren's House, at the Red Hills.—The delivery to her by the defendant of the title deeds of all the premises except Rushkairam.—The cancelment and delivery up to her of the Sheriff's Bill of Sale of the said premises, known as Rushkairam or Wood's Garden, in favor of one Jáfarjí Táyab Ali, dated November 27th, 1855, and of a document—purporting to be a mortgage by one Ghulam Muhammad Saib to Messrs. Ashton, Richardson and Co., of the said several premises known as U'mdah Bagh or Macléan's Garden, Farah Bagh or Ennore Gardens and of the Ahmed Bagh or Red Hill Gardens—bearing date the 1st February 1853, and of another document purporting to be a mortgage by the same Ghulam Muhammad Saib to one Abdul Ali of the premises known as Ghaus Bagh and bearing date the 7th September 1855, and of all assignments executed by the said Jáfarjí Táyab Ali, Messrs Ashton, Richardson and Co., and Abdul Ali, purporting to convey to the defendant any right or title to the said premises.—An account of the rents and profits which the Defendant had received, or which, but for his wilful default and negligence he might have received, in respect of Farah Bagh and Ahmed Bagh. —Costs and further relief.

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The defendant in his written statement said,—As to Maclean's Garden, Dare's House and Farren's House, that they were sold by the Master on 14th January 1858 under a decree at suit of *Messrs. Richardson and Co.* v. *Ghulam Muhammad*, and that he (defendant) had never had anything whatever to do with the said premises or any part thereof or the rents or profits thereof or any of the Title deeds relating thereto.—As to Turnbull's Garden, that on the 1st October 1858 the title deeds thereof were delivered to defendant by Messrs. Richardson and Co., claimants against the Nawab's Estate under Act XXX of 1858.—As to Ghaus Bagh, that on the 7th September 1855, it was, by order of the Nawab, mortgaged by Ghulam Muhammad to one Abdul Ali, who afterwards claimed under Act XXX of 1858, and that on the 7th September 1859, Ghulam Muhammad and Abdul Ali assigned to the defendant, the title deeds of the said premises having been, on the 8th September 1859, pursuant to an order of the Supreme Court, delivered to the Defendant by the Registrar of the said Court.—As to Wood's Garden, that it was, on the 11th January 1855, assigned by the Nawab to Ghulam Muhammad, who mortgaged to one T. Subápati Mudaliar in May 1855: that in November 1855 the interest of the said Ghulam Muhammad in the said premises was seized and sold under a writ of *fieri facias* to one Jáfarjí Táyab Ali: that on the 4th September 1855 the said T. Subápati Mudaliar re-conveyed said premises to Ghulam Muhammad: that the said Jáfarjí Táyab Ali afterwards claimed under Act XXX of 1858, and that on the 13th September 1859 the said premises were conveyed to the defendant by the said T. Subápati Mudaliar, Jáfarjí Táyab Ali and Ghulam Muhammad; but that the defendant had not obtained possession of the said premises nor of any of the title deeds thereof, except the said Sheriff's Bill of Sale of the 29th November 1855.

The following issues were settled:—

1. Whether on or about 6th January 1851 the late Nawab of the Carnatic made a gift in writing to the plaintiff of the six gardens in the plaint mentioned; and whether, if so, the said gift was valid and effectual against any creditors of

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the said Nawab or against subsequent purchasers from him for valuable consideration ?

2. Whether the said gift, if any, was revocable; and whether it was afterwards revoked by the said Nawab?

3. Whether the defendant has or ever had possession of the title deeds of the said three gardens (Maclean's Garden, Dare's Garden, and Farren's House) or of any or either of them ?

4. Whether the claim of the plaintiff in this suit is either wholly or in part barred by the provisions of Act XIV of 1859.

Mayne and *Miller* for the plaintiff.

O'Sullivan for the defendant.

April 15.

This day the following judgment was delivered by

BITTLESTON, J.—This is a suit relating to six gardens.

1. Rushkairam, or Wood's Garden, on the Mount Road.

2. U'mdah Bagh, or Maclean's Garden, also on the Mount Road.

3. Mahbúb Bagh, or Turnbull's Garden, in the village of Adyar, but including 6 grounds and 274½ square feet in Mowbray's Road (as it is called in the plaint).

4. Ghaus Bagh, in Nungumbaukum.

5. Farah Bagh or Dare's House, at Ennore.

6. Ahmed Bagh, or Farren's House, at the Red Hills. And the plaintiff's prayer is for a declaration of her absolute title to the premises 1, 2, 3 and 4, for possession of premises 5 and 6, for delivery to her by the defendant of the title deeds of all the premises excepting No. 1, and for the cancellation and delivery to her of a Sheriff's Bill of Sale of No. 1 in favor of Jafarjí Táyab Ali and of a mortgage by Ghulam Muhammad to Messrs. Richardson of Nos. 2, 5 and 6, and of a mortgage by the same to Abdúl Ali of No. 4, as well as all assignments by Táyab Ali, Richardson or Abdúl Ali to the defendant.

She prays also for an account of rents which defendant has, or, but for his wilful neglect and default, might have

received in respect of Nos. 5 and 6. With respect to three of these gardens, viz., 2, 5 and 6, it appeared from the evidence of Ghulam Muhammad, and was not disputed, that the defendant never had possession of them or of the title deeds relating to them. They appear to have been sold in January 1858, by the Master, under a decree of the late Supreme Court; and the present defendant has had nothing whatever to do with these gardens. Further, two of them, Nos. 5 and 6, of which possession is prayed, are out of the jurisdiction of this Court, and it would, therefore, be manifestly improper for me in this suit to say anything whatever about them. Mr. Mayne said that as the issues were framed so as to include all the gardens, all the questions raised ought to be decided, and that the Court might declare the title as to all. But it is not necessary to give a finding upon any issue which is not necessary for the determination of the suit, and to give a declaration of plaintiff's title in a suit brought against a defendant who has nothing to do with the property, would be to create a very bad precedent.

With respect to No. 3, Turnbull's Garden, it appears that only a small part of that property (*i. e.*, a piece of road, stated in the plaint to measure 6 grounds and 274½ square feet on this side of the Adyar river) is situate within the local limits of this Court's jurisdiction, and a suit therefore for possession of the whole or chief part of that property could certainly not be maintained in this Court.

It may be doubted whether a suit for a declaration of title, merely, can be sustained in a Court which could not decree possession of the property, if the plaintiff required possession,—but in this case it is not material to pursue that question, because the suit would be maintainable even for possession as to the part which is within the jurisdiction, and the case is the same as to both parts, and indeed substantially the same as to the other gardens 1 and 4; and the declaration of the title is of little consequence to the plaintiff, except in connection with the prayer for delivery of title deeds and for the cancellation of the mortgages and assignments under which the defendant claims. Now, the plaintiff's title to all these gardens is based upon an alleged gift of them to her

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by the late Nawab of the Carnatic, on or about the 6th January 1851,—and it is not disputed that at that time the Nawab did express an intention of giving to the plaintiff these gardens; but the question is, whether there was at that time, or subsequently, any complete gift, so as to vest the property in the plaintiff.

The effect of the evidence may be shortly stated. There is the direct testimony of the plaintiff herself, of the Díwan, and of his son Ghúlam Muhammad, as to the absolute nature of the gift, and this testimony is supported by several documents. B 1 (dated 6th January 1851) is the principal document. It contains (*inter alia*) the proposal of the Díwan to H. H. that the six gardens in question should be given to the plaintiff and six others to Kair U'nNissa Bégum, the Shádi wife of the Nawab, and upon it is written by the Nawab the following order, " I have made a slight alteration as occurred to me and sent this back to you; if you think it proper, let this arrangement be carried out, so that each may be put in possession of what is allotted to her on the holy day of Dúzdabosim Sharif."

In pursuance of this order of the Nawab, the Díwan, on the 9th January 1851, sent the document, B 2, to the khansaman or steward of the plaintiff, and this document contains these words,—" Have the gardens below specified (*the six in question*) transferred to the palace of Azím U'nNissa Bégum on the holy 12th day of the present month, and see that the Darogahs and others of the said gardens are admitted on the establishment of the said palace."

The language of both these documents seems to me clearly to import that on that holy twelfth day there was to be a complete gift and transfer of possession of the property in question to the plaintiff; and upon the further evidence which has been adduced, it is, I think, impossible to avoid the conclusion that there was such a transfer of possession.

It is unnecessary to enter upon a minute examination of all the evidence on this subject. [His Lordship then shortly re-capitulated the evidence of various servants

as to their receiving their pay at Wood's Garden (plaintiff's residence) instead of at Pater's Garden (where I'náyat U'nNissa had lived) and that this change began about the middle of January 1851. He continued—] There is also a letter of the Díwan, dated 25th June 1851 (H. 1), addressed to the khansaman of the plaintiff's palace, wherein the Díwan directs him to inform the Bégum Sahiba that whether the money was paid from the treasury or from the palace it was just the same, but for the present there was no money available in the Treasury; it was, therefore, written that it should be paid from the palace. "Besides this the amount of repairs ought to be paid out of the rent of the upstair house, which is sent in to the palace."

Upon the face of this letter there is nothing to show to what property it refers, but if the Nawab's letter to the Díwan, dated on the 29th June 1851, H. 3 (which, though only a copy, was received in evidence without objection) be looked at, it appears clearly enough that it was the Ennore house which was referred to, and that Azím U'nNissa had applied that the repairs done to that house should be paid for from the Treasury, and that the amount should be taken back afterwards, either from the rents or her monthly allowance: and the Nawab naturally adds "if this be possible, it is better to act in conformity with what she has written."

If I understand correctly the account (Z) which has been translated, it shows that that was afterwards done, and that an account was kept of money advanced from the Treasury to Azím U'nNissa for disbursements on account of these gardens.

But if the letters H. 1 and H. 3 were really written by the Díwan and the Nawab, nothing can be stronger to show that the property alluded to was regarded by them both as belonging to Azím U'nNissa. Again, as to the Ennore house, there is the Díwan's letter of 23rd December 1851 (H. 2) in which he writes to the khansaman of the palace of Azím U'nNissa Bégum Saiba in these terms, "Mr. Kenrick offers to occupy the upstair house of Farah Bagh at Ennore for three weeks. I hope, therefore, you will allow him to live

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in the said gardens and communicate the same to the Darogah and others of that place."

There is also among the dufters of the plaintiff the account (G. 3) showing in detail the receipts and disbursements connected with the repairs of Ahmed Bagh "attached to the palace of H. H. Azím U'nNissa Bégum Sahiba from 17th July 1851 to 14th November of the same year."

I may refer also to the documents E. 3, which are Venkata Maistry's receipts of Rupees 1,000 each, on account of repairs done at Turnbull's Gardens, and dated respectively 10th September and 6th October 1851, in one of which the garden is described as attached to the palace of H. H. Azím U'nNissa Bégum, and in the other the money is said to be received from the palace of H. H. Azim U'nNissa Bégum, through the English gentleman, Ellis, who was, I suppose, occupying Turnbull's Garden at that time as tenant. Some of the documents above mentioned refer only to the gardens 2, 5 and 6; but as the gift, if made at all, was one gift at the same time of all the six gardens, the evidence of subsequent possession of any one of them is material to show the complete and absolute nature of the gift, and many of the documents given in evidence (as the document Z for example) relate to all the gardens. No. 1, Wood's Garden, is the place where the plaintiff was living at the time of the gift and where she has lived ever since; and though the lady herself seems to have been somewhat confused in giving her evidence, as to the time when she received possession of all these gardens, there is no documentary evidence of any title in her prior to the year 1851, and all the documents from that time to the present, whether produced from the palace of the plaintiff, or from the Nawab's records, are uniform and consistent in their description of these gardens as the property of Azím U'nNissa Bégum. But it is said that whatever show there may have been of a transfer of possession, the subsequent acts of ownership by the Nawab himself are sufficient to prevent the inference that there was any perfect gift. The Nawab, no doubt, after the gift continued to live with the plaintiff, his Nicka wife, as he had done before, and so he had a certain possession and enjoyment of whatever belonged to her. He lived at Wood's Garden with the

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plaintiff, and he accompanied the plaintiff to other gardens, when she changed her residence from time to time. So it appears that the Circus establishment was kept up in Maclean's garden during his life. But this is not enough to invalidate the gift according to Muhammadan law, as was said by Sir L. Peel in *Doe* d. *Mookerjee* v. *Bibu Jeenut*, Fult. R. 152,—"It would be absurd to suppose the necessity of the husband's never occupying those premises which he has given to his wife."

The case of a gift by wife to husband is expressly mentioned as an exception to the general rule that a gift is null and void if the donor continues to exercise any act of ownership over it. (McNaghten, p. 51, cl. 9.)

In case 22 of the *Precedents of Gifts* (p. 23) it is said—"In books of Law it is expressly stated that if a person dispose by gift of a house to another and continue himself to inhabit it, or even keep some part of his property therein, the gift is void from the circumstance of complete delivery and possession not having been established. Except in the instance of a wife who may give a house to a husband, in which case the gift will be good, although she continue to occupy it along with her husband, and keep all her property therein; because the wife and her property are both in the legal possession of her husband. So also some lawyers have held that if a father transfer his house to his minor son, himself continuing to occupy it and to keep his property therein, the gift is valid; on the principle that the father in retaining possession is acting as agent for his son, according to which doctrine his possession is equivalent to that of his son." Reason requires that the same principle should be applied to the case of a gift by husband to wife. The wife may, according to Muhammadan law, hold property independent of her husband, and as a husband may make a valid gift to his wife, it can only be necessary that the gift should be accompanied with such a change of possession as the subject is capable of, and as is consistent with the continuance of the relation of husband and wife (See case cited in App. to Mr. Sloan's Ed. of MacNaghten, p. 440, from 1 S. D., A. N. W. P. 199).

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But reliance was chiefly placed upon the use which the Nawab made of the title deeds of the gardens in question subsequently to the gift. It appears that the title deeds of these gardens were not delivered to the plaintiff at the time of the alleged gift, and that she has never had in her possession the title deeds of any of the gardens, excepting No. 1, of which she received some title deed about the 7th or 8th September 1855.

The title deeds having remained with the Díwan, were subsequently, by order of the Nawab, mortgaged through Ghulam Muhammad and Salar úl-Múlk to different persons, from whom money was obtained for the Nawab's use; and these transactions are admitted and set forth in the plaint; but the plaintiff's case is that they took place without her knowledge, or consent, and constituted a breach of trust on the part of the Nawab. In this allegation the plaintiff herself is supported by the Díwan and Ghulam Muhammad, both of whom say that the plaintiff was, by the Nawab's desire, kept in ignorance of the purpose to which the deeds were applied. And the Díwan says that the plaintiff was frequently asking for the deeds, and was put off by promises that they would be sent to her.

This, too, is in a great measure borne out by the documents.

The document (N) has reference to a mortgage of gold and jewels, not of title deeds, and can have no bearing on this case, except as showing that the Nawab did on one occasion mortgage for his own purposes some property of Azim U'nNissa without her knowledge. But the document O shows that, in May 1852, Azím U'nNissa had been applying for some title deeds and that the Nawab was desirous that they should be handed to her. It is a letter by the Nawab to the Díwan, dated 30th May 1852, and in these terms, "Please to send the grant deeds which belong to Azím U'nNissa Bégum together with the grant deed of her market, if the money that was borrowed through your means has been fully paid off, so that they may be delivered to her, as she has applied for them." Annexed to this letter is a memorandum of the same date,

stating that the grant deeds of A'zím Bagh, &c, had been sent to the Collector of Chingleput, in consequence of a dispute touching the land, and that the writer would, immediately on the receipt, which would be in five or six days, forward the same. That there still remained part of the debt raised on the market unpaid, and that that grant deed would also be forwarded immediately on its being paid off. I do not find any evidence as to the handwriting of this memo., and it does not appear to be signed by any one. It is probably written by the Díwan, and indeed the Nawab's letter of the 29th June 1852 seems to allude to it as the Díwan's, but whether that be so or not, is of little consequence: the importance of these documents being the express recognition which they contain by the Nawab and his Officers of the right of the plaintiff to have the documents. The document P, a letter by the Nawab to Salar úl-Múlk, dated 29th June 1852, though it avows the purpose of mortgaging the property of his Bégum for his temporary convenience, contains also an acknowledgment of their title, and expresses an anxiety that the property should be redeemed as speedily as possible. U, another letter of the same date by the Nawab to Salar úl-Múlk, is in the same tone. These letters indicate to me that Salar úl-Múlk was pressing the Nawab to get the title deeds of the ladies from the Díwan, that they might be used for the purpose of raising money on them; and that the Nawab was yielding to the pressure, but with reluctance, and with expressions of anxiety that the deeds should be redeemed and sent to the ladies as soon as possible. But by far the strongest piece of evidence on this part of the case is contained in the document Q. It is dated 6th August 1853, and is written by the Nawab to Salar úl-Múlk, directing him to tell the gentlemen of the Istufa, in answer to their letter, that he (the Nawab) had no objection to comply with their request (pretty clearly a request that some title deeds should be mortgaged), but saying that before it could be done,—He asked them two or three questions, thus—"Firstly: several of the documents and title deeds in question have been heretofore mortgaged in different matters, a fact well known to you, and perhaps it may be years before they will

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be redeemed; and now, if the other title deeds be pledged, only a dividend would be paid according to the existing arrangements in satisfaction of this debt, and so it is not known *when* they would be redeemed. *They belong to others* —that is, to Azím U'nNissa Bégum and Dúlhan Bégum. If these title deeds should all be redeemed and delivered to them, it would be well and good. If otherwise, they would tell that for my own business I had ruined their property, and it is evident that after me no one would help them in this respect." The evidence of Ghulam Muhammad shows clearly enough the transactions to which the Nawab was alluding, and turning to the entries in the accounts, we find additional confirmation of his statements. [His Lordship then referred in detail to these entries and to some other documents and continued]

From the language used by the Nawab and the Díwan in these documents, it seems to me impossible to draw any other conclusion than that which the Díwan in his evidence represents as the fact, viz., that the property in these gardens, and the title deeds, were considered by them as having passed absolutely to the plaintiff, and that the subsequent mortgaging of them by the Nawab's orders was a wrong done to her, and was kept secret from her. It appears, therefore, to me, that the retention and use of the title deeds by the Nawab did not, under the circumstances of this case, amount to any qualification of the absolute nature of the gift to the plaintiff, nor render it invalid on the ground that the thing given was only partially relinquished by the donor.

But assuming the gift to have been perfect and valid at the date of it, it is necessary further to consider whether it is valid as against subsequent creditors of the Nawab and subsequent purchasers for valuable consideration, for the defendant claims to hold the title deeds in his possession as representing creditors and purchasers for valuable consideration. It appears that the documents which relate to Turnbull's garden were delivered to the defendant by Messrs. Richardson, on their filing a claim under Act XXX of 1858, and these deeds had been deposited by Ghulam Muhammad with the Messrs. Richard-

son to secure a debt due to them by the Nawab. The plaint admits that the claim of Messrs. Richardson was paid by the defendant and the title deeds transferred to him; so that he now stands in the shoes of the original creditors, unless Act XXX of 1858 operates to the contrary, a point to be afterwards considered. The title deeds of Ghaus Bagh were received from Abdul Ali, to whom they had been mortgaged on the 7th September 1855, and who filed a claim under Act XXX of 1858, and obtained payment of his debt from the defendant. One condition of that payment was that a conveyance of Ghaus Bagh to the defendant should be executed by Abdul Ali and Ghulam Muhammad, and the document, No. 2, is that conveyance. It contains a recital of the Nawab's title to the premises in September 1855, but this recital is, of course, no evidence against the plaintiff; and is not, perhaps, of much weight as affecting the testimony of Ghulam Muhammad. But this document and the possession of the title deeds, at all events purports to give, and was intended to give, to the defendant, any right which Abdul Ali had as a creditor of the Nawab.

With respect to Rushkairam, the plaintiff does not ask for the title deeds—She is satisfied with what she received in September 1855 from the Díwan; but she seeks to get rid of the Sheriff's Bill of Sale of the 29th November 1855 in favor of Jafarjí Táyab Ali, and of any assignment from him to the defendant. It appears by the documents 4 and 5, that by virtue of a writ of execution out of the Supreme Court, in a suit by Jafarjí Táyab Ali against Intezzan Khan and Ghulam Muhammad, the Sheriff sold to the said Jafarjí Táyab Ali the right, title and interest of Ghulam Muhammad in the premises called Rushkairam, and executed to him a bill of sale thereof on the 29th November 1855; but on the 21st November 1855, a notice was given to the Sheriff (which was read out at the sale) that the property belonged to the plaintiff and that she was in possession thereof and of the title deeds relating thereto; of this property, however, (which appears to be leasehold) there is also a conveyance to the defendant (No. 3) by Ghulam Muhammad and Jafarjí Táyab Ali, reciting the title of the Nawab—an

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assignment to Ghulam Muhammad by the Nawab in January 1855 (this, of course, is the English document spoken of by Ghulam Muhammad, as to which he said that he did not know what had become of it)—the suit by Jafarjí Táyab Ali and the execution and bill of sale by the Sheriff—and that the debt of the defendant in that suit was contracted for the use of the Nawab (and that is in accordance with Ghulam Muhammad's evidence)—a claim by Jafarjí Táyab Ali under the Nawab's Act and payment to him by the defendant of Rupees 33,034-10-5. So that the defendant has in him whatever passed to Ghulam Muhammad under the Nawab's assignment, and whatever passed to Jafarjí Táyab Ali under the Sheriff's bill of sale. But, confessedly, the assignment to Ghulam Muhammad was merely to enable him to raise money for the Nawab; and when the money which was borrowed from Subápati had been paid off and the title deeds handed to the plaintiff, the assignment had answered its purpose, and no interest certainly remained in Ghulam Muhammad. Then what passed to Jafarjí Táyab Ali under the Sheriff's bill of sale was only the title or interest of Ghulam Muhammad, which was nothing, and he (Jafarjí) had notice of the plaintiff's title when he purchased. It seems to me, therefore, that the plaintiff would be entitled to the cancellation and delivery up of the Sheriff's bill of sale and conveyance, No. 3, subject to the further questions still to be considered.

First, was the gift to the plaintiff altogether void as being in fraud of creditors? I will asssume that according to Muhammadan law it might be impeached on that ground, though the mere existence of debts due by the donor at the time of the gift would not be sufficient to establish such fraud [See p. 441 of App. to Mr. Sloan's Ed. of Macnaghten, citing a case from Morris' cases S. D. A. Bom. Vol. II, page 103]. At page 154 of Fulton's Reports, Sir L. Peel, in the case already referred to says, "There is no evidence before us that the donor (who was a trader) was in debt at the time of making this gift, nor is there any evidence to show that he executed it in contemplation of insolvency, or

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with a view to defraud creditors"—but it is not to be inferred from these words that if he had been shown to be in debt, the gift would, on that account, have been held invalid. In the present case, the donor was not a trader but a Sovereign Prince; and though it is proved by the Díwan, and the evidence otherwise leads to the inference that he was in embarrassed circumstances, and the recital in Act XXX of 1858 is to the same effect: yet, he had no doubt large resources, and the Government were administering on his behalf the whole revenues of the Carnatic and might at any time apply those revenues to the discharge of the Nawab's debts. Further, he was not liable to be sued as an ordinary debtor is. In making, therefore, a provision for his wives out of property inherited by him from his mother, I cannot say that there was necessarily involved any intention to defraud his creditors. I think that this would be so, even if English law were applied to the case, on behalf of any English creditors of the Nawab, subsequent to the date of the gift, for the English law on the subject is this—I use the words of L. C. Westbury in the case of *Spirett* v. *Willows*, 34 L. J. Ch. 367, "There is some inconsistency in the decided cases on the subject of conveyances in fraud of creditors; but I think the following conclusions are well founded. If the debt of the creditor, by whom the voluntary settlement is impeached, existed at the date of the settlement, and it is shown that the remedy of the creditor is defeated or delayed by the existence of the settlement, it is immaterial whether the debtor was or was not solvent after making the settlement. But if a voluntary settlement or deed of gift be impeached by subsequent creditors, when debts had not been contracted at the date of the settlement, then it is necessary to show either that the settlor made the settlement with express intent to "delay, hinder, or defraud creditors," or that after the settlement the settlor had no sufficient means or reasonable expectation of being able to pay his then existing debts—that is to say, was reduced to a state of insolvency, in which case the law infers that the settlement was made with intent to "delay, hinder, or defraud creditors," and is therefore fraudulent and void."

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Secondly,—Can the defendant, so far as he derives his title from the mortgagees subsequent to the gift, defend himself on the ground that they were purchasers for valuable consideration without notice? I think it must be taken that the defendant himself had notice, for the letter to the Sheriff in November 1855, is signed Dale, Boyson and Miller, and is cogent evidence that the defendant knew, in fact, of the plaintiff's title, long before the execution of any conveyances to him. But if those from whom the defendant was a purchaser were themselves purchasers without notice, the defendant may shelter himself under those purchases. [See Lord Redesdale's *Ch. Pleadings*, 5th Ed., p. 323, and cases cited in the notes to *Le Neve* v. *Le Neve*, 2 Wh. and Tudor L. C., pp. 36 & 37].

This defence is peculiar to a Court of Equity, it is the creature of the Court of Equity, and great care is required as to the admission of it in a Court which combines the jurisdiction of a Court of Law and a Court of Equity, and the procedure of which renders it necessary to administer both law and equity in one and the same suit. But it seems to me that the defence is admissible in this Court on the Original Side whenever and so far as the relief sought for is such as could only be given by a Court of Equity, that is "equitable as distinguished from legal relief,"—to use the words of L. C. Westbury in *Phillips* v. *Phillips*, (31 L. J. Ch. 326). In that case, this defence was much discussed in consequence of a decision of the Master of the Rolls in *The Atty. Genl.* v. *Wilkins* (17 Beav. 285-293), and the Lord Chancellor, though assenting to that decision, as explained in a subsequent case of *Colyer* v. *Finch* (19 Beav. 500 and 5 H. L. C. 905), states that he does not agree in some of the observations attributed to the Master of the Rolls in the Report. And he mentions three classes of cases in which the use of this defence is most familiar.—"First, where an application is made to the auxiliary jurisdiction of the Court by the possessor of a legal title, as by an heir at law, which was the case of *Basset* v. *Nosworthy*, or by a tenant for life for the delivery of title deeds, which was the case of *Wallwyn* v. *Lee*, and the defendant pleads he is a *bonâ fide* purchaser for valuable consideration without notice, the

defence is good, and the reason given is that as against a purchaser for valuable consideration without notice, the Court gives no assistance, that is no assistance to the legal title."

Now this suit, so far as it prays for a *specific* delivery of title deeds, and a cancellation and delivery up of mortgages and assignments casting a cloud upon the plaintiff's title, is a suit for equitable as distinguished from legal relief; and the creditors who advanced money on the security of the title deeds, whether they obtained a legal mortgage, or only an equitable mortgage by deposit of the title deeds, would, I think, be entitled to set up the defence of purchase for valuable consideration without notice. The case of *Joyce* v. *De Moleyns* (2 J. & L. 374) is an express authority to that effect, following Lord Eldon's decision in *Wallwyn* v. *Lee* (9 Ves. 24). In *Joyce* v. *De Moleyns*, the heir-at-law obtained possession of title deeds relating to impropriate tithes of which his second brother under their father's will was tenant for life, and he deposited them with bankers by way of equitable mortgage to secure a loan. In a suit by a bond creditor for administration of the father's estate, the bill prayed that the bankers might be decreed to deliver the deeds. The bankers set up that they were purchasers for valuable consideration without notice, and Lord Chancellor Sugden dismissed the bill as against the bankers with costs. In the course of his judgment, he says,—"Deeds are chattels; and where no adverse claimant interferes, the person entitled to the estate is entitled to the deeds. But the person who has possession of the deeds may deal with them as with any other chattels, subject to the rights of those who are interested in them. Here, a person obtains the possession of title deeds, having no title to the estate; another person advances money to him upon the security of a deposit of the deeds. The rule, therefore, comes into operation (for it applies equally to real estate and to chattels) that if a man advance money *bonâ fide* and without notice of the infirmity of the title of the seller, he will be protected in this Court, and the parties having title must seek relief elsewhere."

Other cases are collected in the notes to *Basset* v. *Nosworthy*, and the result is thus stated by the learned editor, Mr.

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Tudor.—"It may, therefore, at last be considered as settled that a person, although he has only an equitable estate, may avail himself of the defence that he is a purchaser for valuable consideration without notice even against a person having a legal title." A distinction, however, has been made in the case of a legal mortgagee, who is held entitled to an ordinary foreclosure decree even against a purchaser for valuable consideration without notice. See *Colyer* v. *Finch* (5 H. L. C. 905), where Lord Cranworth observes that in such a case a foreclosure is not relief at all. The mortgagee who seeks foreclosure stands in such a position to the mortgagor, or the purchaser from the mortgagor for valuable consideration without notice, that that purchaser can at any time file a bill to redeem the mortgage, and that being so, it would be most unjust if there was not a correlative right on the part of the mortgagee to say "you shall redeem now or you shall never redeem."

The case to which Mr. Mayne referred (*Hunt* v. *Elmes*, 30 L. J. Ch. 255), is an example of the application of the rule, established in *Colyer* v. *Finch*, that a legal mortgagee is entitled to an ordinary foreclosure decree even against a purchaser for valuable consideration without notice; but it shows also that fraud, or gross and wilful negligence on his part in leaving the title deeds with the mortgagor, would disentitle him even to that relief. In that case, the plaintiff had put faith in the assertions of his own solicitor that a bundle of deeds handed to him contained all the deeds relating to the estate mortgaged, and in so doing he was considered not guilty of such negligence as disentitled him to a decree for foreclosure against a subsequent purchaser without notice. But the Lords Justices discharged so much of the decree of the Master of the Rolls as directed the subsequent purchaser to deliver up the title deeds to the plaintiff.

Similarly, in *Hewitt* v. *Loosemore* (9 Hare, 449, 458; 21 L. J. Ch. 69), where a prior equitable mortgagee by deposit of title deeds sued for foreclosure, and prayed that he might have priority over a subsequent legal mortgagee, the Vice Chancellor Turner said,—"The law, therefore, as I collect it from the authorities stands thus: that a legal mortgage is not to be postponed to a prior equitable one on the ground of not

having got in the title deeds, unless there has been fraud, or gross and wilful negligence on the part of the legal mortgagee, and that the Court will not impute such fraud or negligence to him, if there has been a *bonâ fide* enquiry after the deeds and a reasonable excuse given for non-delivery of them; but that the Court will impute fraud, or gross and wilful negligence to him, if he omit all enquiry as to the deeds. I am of opinion that there is much principle both in the rule and the distinctions upon it. When this Court is called upon to postpone a legal mortgagee, its powers are invoked to take away a legal right, and I see no ground which can justify it in doing so, except fraud, or gross and wilful negligence, which, in the eye of this Court, amounts to fraud; and I think, that in transactions of sale and mortgage of estates, if there be no enquiry as to the title deeds which constitute the sole evidence of the title to such property, the Court is justified in assuming that the purchaser or mortgagee has abstained from making the enquiry, from a suspicion that his title would be affected if it was made, and is, therefore, bound to impute to him the knowledge which the enquiry, if made, would have imparted. But, I think, if a bonâ fide enquiry is made and a reasonable excuse given, there is no ground for imputing the suspicion or the notice which is consequent upon it." In the present case, I think the evidence establishes that the plaintiff did make enquiry concerning the title deeds, and—bearing in mind that this transaction was not one of sale or mortgage, but of a gift by a husband to his wife—I agree with Mr. Mayne that the plaintiff cannot be considered as having disentitled herself to any remedy to which she would otherwise be entitled, on account of negligence on her part in leaving the title deeds under the control of her husband, the Nawab,—but upon the authorities and for the reasons above assigned, I am of opinion that the defendant is entitled to say, both as respects Ghaus Bagh and Turnbull's garden (though not as respects Rushkairam), that he derives title from purchasers for valuable consideration without notice, and that neither specific delivery of the title deeds nor cancellation of the mortgages and assignments can be decreed against him. This, however, would not interfere with the

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plaintiff's right, as at law, to an alternative decree either for delivery of the title deeds or for the payment of damages.

Thirdly,—Independently of notice, is the gift to the plaintiff fraudulent and void as against subsequent purchasers for value ? According to English law, I take it to be clear that it would be so by virtue of the Statute 27 Eliz. Chap. IV, to the extent necessary to give effect to the conveyance or settlement for value. See *Buckle* v. *Mitchell*, 18 Ves. 110, and other cases cited in the notes to *Ellison* v. *Ellison*, 1 Wh. & T. L. C. 233. The question, therefore, is reduced to this, whether the Statute of Elizabeth and the decisions thereon are applicable to this case.

That statute has not, so far as I am aware, been expressly extended to India, nor is there any direct decision in which it has been held applicable to this country.

In Morton's Cal. Rep. 358, there is a *semble* that the statute (which is *in pari materiâ*) 13 Eliz. Cap. V, appears to be considered as extending to India; and in a case arising entirely between British subjects, other than Hindus or Muhammadans, I am disposed to think that in accordance with the reasoning in *Freeman* v. *Fairlie* (1 Moo. I. A. 305), and the *Mayor of Lyons* v. *The E. I. C.*, id. p. 175, the Statute 27 Eliz. ought also to be so considered.

But the gift in this case was by a Muhammadan to a Muhammadan, and any question as to its validity must, I think, be decided by Muhammadan Law. It is true that the defendant is not a Muhammadan but an European British subject, and the persons from whom he claims, *i. e.*, the Nawab's creditors, were also in one case, viz., as respects Turnbull's garden, not Muhammadans but East Indians who would be governed by English law: but this cannot affect the plaintiff's title. The provision of the charter of the Supreme Court is that "in the cases of Muhammadans their inheritance and succession to lands, rents and goods, and all matters of contract and dealing between party and party shall be determined by the laws and usages of the Muhammadans; and when one of the parties shall be a Muhammadan by the laws and usages of the defendant." But that does not mean that whenever the defendant in a suit is an

European British subject, no law but the law of England shall be applied to ascertain the validity of any past transactions which may be brought under consideration in the suit. Its only effect, as I apprehend, is this, that when a dealing takes place between two parties, of whom one only is Muhammadan, and a suit is brought in respect of that transaction, the dispute between those parties is to be decided according to the law of the defendant.

The transaction on which the plaintiff's title depends was, however, between Muhammadans only, and though the donor afterwards dealt with persons not Muhammadans, and not subject to Muhammadan law, the plaintiff was no party to any such dealing, and she cannot, by the Nawab's acts, be rendered subject (as regards her property) to any other than the Muhammadan law.

I believe I have now disposed of all the questions raised by the issues in this case, excepting that as to the Law of Limitation. In passing Act XIV of 1859, it was clearly the intention of the legislature to prescribe the period of limitation for suits of every description; and in order to ascertain which of the periods is applicable to any particular suit, it is in the first place necessary to consider what is the substantial object of the suit. In the present case, it seems to me that the substantial object of the suit as to all but the gardens 2, 5 and 6, is to obtain possession of the title deeds which the defendant withholds under a claim adverse to the plaintiff's right. The prayer for a declaration of her title, and for the cancellation of the documents under which the defendant claims, is ancillary and subordinate to the substantial prayer for a decree ordering the defendant to deliver possession of the title deeds. As to the gardens 2, 5 and 6, on the other hand, the suit is substantially a suit for possession of the immoveable property, and the prayer for a declaration of title and cancellation of documents is ancillary to the prayer for possession. The difference between the two cases is this, as it seems to me, that six years is the period of limitation in the former—12 years in the latter.

As regards a merely declaratory decree, I think that it cannot be considered independently of the purpose for which

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the declaration is made. No Court would, I suppose, make a decree declaring the plaintiff's title merely to gratify a fancy of the plaintiff for such a decree. If the plaintiff be out of possession and the declaration be made for the purpose of enabling him to obtain possession at a future time (as in some of the cases decided on the Appellate side of the Court; as to which I am, by no means, satisfied that they are applicable on the Original side) the suit may, perhaps, be said to be a suit for the recovery of immoveable property, or of an interest in immoveable property, but when the plaintiff is in full and complete possession of the immoveable property and seeks the declaration only with a view to establish a right to the possession of title deeds, or to clear away some cloud upon the title, it seems to me that the suit cannot be considered as falling under Sec. I, cl. 12, but that it falls under the 16th clause of that section, giving the period of six years. As regards a suit to obtain possession of title deeds, Mr. Mayne admitted that such a suit would fall under cl. 16 of Section I, and that in the present case, as it appears clearly upon the evidence that the plaintiff was made acquainted with the facts concerning the Nawab's mortgage of these title deeds a few months after the Nawab's death, which took place in October 1855, this suit would, so far, be barred but for the operation of Sec. 2 of the Act. Again, as regards the prayer for cancellation of documents, whenever that is the sole object of the suit and is unconnected with any claim of the plaintiff for possession of immoveable property, or an interest in immoveable property, it is the 16th and not the 12th clause which governs the case. The result is that, in my opinion, this suit is barred by the Law of Limitation so far as it relates to the gardens of Rushkairam, Ghaus Bagh and Turnbull's garden, as to all of which the plaintiff's case is full, complete and uninterrupted possession and enjoyment from January 1855 to the present day; unless the 2nd Section applies to this case. That section provides that "No suit against a trustee in his lifetime and no suits against his representatives for the purpose of following in their hands the specific property which is the subject of the trust, shall be barred by any length of time." As respects the garden No. 1, this section does not apply, for, as to that garden, this

is not a suit for the specific property the subject of the trust. But as to gardens 3 and 4, assuming that the Nawab held the title deeds in question as trustee for the plaintiff, is this a suit against the Nawab's representative within the meaning of the section? I think not. In my opinion, the word 'representative' means the person who, as heir, or executor, or administrator, represents the estate of a deceased trustee; and who has received, as such representative, the specific property which is the subject of the trust.

It is very reasonable that no lapse of time should be allowed to bar a suit against a trustee who has committed a breach of trust; and even after his death if the property which is the subject of the trust has passed into the hands of his representatives, as part of his estate, it is equally reasonable that the cestui que trust should, after any lapse of time, be permitted to recover from the hands of the representatives that specific property. But if the property has been sold by the trustee in his lifetime, or has in any way disappeared and can no longer be traced, and the suit is brought against the representatives to make good the loss out of the general estate, the Legislature has thought the same reason no longer applicable and has provided that in such case the proper period of limitation according to the preceding section should be computed from the death of the trustee.

The only other place in which the word 'representative' is used in this Act is in Section 11, and there it is used in the same sense which I attribute to it in Sec. 2. But Mr. Mayne relies upon the effect of Act XXX of 1858, as giving to the defendant the character of the Nawab's representative; and no doubt, that Act, Section 4, does declare that the Receiver shall represent the estate of the Nawab in all proceedings relating thereto under that Act or otherwise, and gives him full powers to get in the estate: but the question is, as it seems to me, whether the defendant holds the title deeds of these gardens simply as the Nawab's representative, or whether he has not an independent title as claiming under purchasers for valuable consideration. In the latter case, the 5th Section of the Limitation Act provides that the cause of action shall be deemed to have arisen at the date of

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the purchase. Independently of Act XXX of 1858, suppose the case of a deceased trustee having fraudulently mortgaged the title deeds of the cestui que trust, and suppose that the executor redeemed the title deeds from the mortgagee, would the case fall under the 5th Section? Probably not, for the executor redeeming out of the estate of the testator would only be in the same position as the deceased trustee if he had redeemed in his lifetime, and no length of time will bar a suit against the trustee. But suppose that the executor should, out of his own funds, or out of funds on behalf of another person, redeem and take a transfer of the mortgage, would not the case then fall under the 5th Section? I think it would. In *Ritchie* v. *Stokes* (2 M. H. C. R. 263), this Court said that if an administrator "pays debts due by the intestate out of his own money in due course of administration, he becomes a creditor for the amount so paid and may retain assets to pay himself." And, if as mortgage creditor, then as purchaser for value at all events, it is clear, he is entitled to stand in the place of the creditors he has paid. It seems to me that the Legislature has intended to draw a distinction between the cases in which the interests of third parties are involved and those in which the only parties are the trustee, or the representatives of his estate, on the one side, and the cestui que trust or his representatives on the other. Now, Act XXX of 1858 contains a very special set of enactments. It appoints an officer for collecting the property of the Nawab and provides a machinery for the administration of the estate, as well as a summary method of ascertaining the amounts due to creditors, it provides for the payment of the debts out of the property, and it requires the E. I. Co. to make good any deficiency. Under this Act, no order for the general administration of the estate has ever been applied for, and no account of the estate has ever been taken; but numerous creditors have availed themselves of the summary procedure under Sec. 14. Claims have been investigated and orders made for payment, and (as required by the Act) mortgages and securities have been given up to the Receiver. Supposing that an order should be made under Sec. 8 for an administration of the estate, one of the declared purposes of the Act is to protect *boná fide* creditors of the Nawab from the

effect of conveyances executed by the Nawab under such circumstances as rendered them void against such creditors, and the enactment to carry out that purpose is in Sec. 11 that if there shall appear good reason to believe that any instrument executed by the Nawab in his lifetime was executed under circumstances which rendered it void as against creditors, the Court may order the person claiming under it to establish his claim; and in default of compliance may declare the same void as against creditors, and order the property thereby conveyed to be delivered to the Receiver. But before any such order is made numerous creditors have been paid by the Receiver, who holds their securities. Does not the Receiver also to some extent represent the Government (by which he is appointed and to which he gives security) and, as the Government has a pecuniary interest in the estate, is he not entitled, as representing the Government, to stand in the shoes of the creditors whom he has paid off for the purpose of protecting that estate from claims, such as are referred to in Sec. 11? It seems to me that that must be so. No provision is expressly made in the Act as to the payment or delivery over to the Government by the Receiver of any property remaining in his hands after payment of the debts, but the recital of the willingness of the East India Company to allow the whole property of the Nawab (after appropriating to the payment of debts such portion as is liable to the payment thereof) to be applied towards making provision for his family and dependents, imports that the company would make that provision; for the words can hardly refer to a decree of the Court in an administration suit, which certainly would not provide for dependents.

In point of fact, the Receiver has taken care to get conveyances to himself of any right or interest which the creditors had in the Nawab's estate; and this proceeding seems to me in accordance with the intention of the Act. Upon the whole, notwithstanding the words of Sec. 4 of Act XXX of 1858, it does appear to me that the Receiver of the Carnatic property is not *simpliciter* the representative of the

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Nawab's estate, so as to bring this case within Sec. 2 of the Limitation Act, but that, as a suit against the Nawab's creditors whose securities have been transferred to the defendant would have fallen under Sec. 5, so this suit falls under that section, because the defendant claims under them.

Of course, no such case as this was contemplated by the framers of Act XIV of 1859, and it is not without hesitation that I have arrived at a conclusion on the subject. What has principally influenced me is the belief that Sec. 5 was intended to apply to cases where the interests of third parties other than the trustee and cestui que trust were affected by the suit; and that, having reference to the provisions of Act XXX of 1858, this is a case of that kind.

The suit, therefore, is, I think, barred by the Law of Limitation as regards the gardens 1, 3 and 4, and it cannot be maintained as regards the gardens 2, 5 and 6, because the defendant has not, nor ever had, anything to do with them.

Suit dismissed with costs.

Messrs. Branson and Branson, Attorneys for the plaintiff.

Messrs. Shaw and Alldritt, Attorneys for the defendant.

MADRAS HIGH COURT RULINGS.

Appellate Side.

Proceedings, 4th November 1869. (*a*)

THE following case, not reported at the time of the decision, which decides a frequently recurring question, is inserted :— 1869. *November 4.*

Civil Miscellaneous Regular Appeal No. 142 *of* 1869.

Prabhalanadha Pillay............................*Petitioner.*
Ponnusawmy Chetty......... .... *Counter-Petitioner.*

This was an appeal against the order of the Civil Court of Tranquebar, dated 5th March 1869, passed on Miscellaneous Petition No. 480 of 1869.

The Court delivered the following

A plaintiff cannot recover more than is clearly given to him by the decree either in express terms or by necessary inference. Where the plaint prayed for interest up to the date of the suit together with subsequent interest and the decree purported to be an award in accordance with the prayer of the plaint. *Held*, that the plaintiff was not entitled to interest subsequent to the date of the decree.

JUDGMENT :—We are of opinion that the Civil Court was wrong in allowing to the plaintiff interest subsequent to the date of the decree. The plaintiff cannot recover more than is clearly given to him by the decree either in express terms or by necessary inference. The decree purports, no doubt, to be an award in accordance with the prayer of the plaint, and in the plaint interest up to the date of the suit is prayed for *together with subsequent interest*, but this latter phrase is an ambiguous expression which would be fully satisfied by giving the plaintiff interest subsequent to the date of the suit up to the date of the decree, and that this is all that is given by the decree is clear on the face of the decree which calculates the interest up to the date of the decree. If the Civil Court intended to give also interest subsequent to the date of the decree it certainly has not said so, and the reference in the decree to the prayer of the plaint is sufficiently satisfied by what is given in the

(*a*) Present :—Innes, and Collett, J. J.

1869. November 4.

decree. We are not disposed to give a plaintiff anything more than clearly appears from the decree that he is entitled to, and we may add that we entirely disapprove of the loose practice of drawing up a decree by a reference to the plaint. The decree itself should be explicit and call for no reference to any other document.

The order below is reversed with costs.

Appellate Side.

Proceedings, 10th November 1870.

1870. November 10.

UPON reading a letter, dated 16th September 1870, from the Magistrate of Bellary, referring for the orders of the High Court, a communication received from the Deputy Magistrate,

The High Court made the following

When a Civil or Criminal Court sends a case for investigation to a Magistrate under Section 171 of the Code of Criminal Procedure, the Magistrate to whom the case is sent must himself hold the investigation.

RULING:—The question raised is whether, when a Civil or Criminal Court sends a case for investigation to a Magistrate under Section 171 of the Code of Criminal Procedure, that Magistrate is at liberty to transfer the case to a Magistrate subordinate to him under Section 273 of the Code.

The High Court are clearly of opinion that the provision of Section 273 is inapplicable in such a case, and that the Magistrate to whom the case is sent must himself hold the investigation.

Appellate Side.

Proceedings, 16th November 1870.

1870. November 16.

UPON reading a letter, dated the 10th October 1870, No. 32 from the Acting Session Judge of Chittoor, referring for the orders of the High Court, under Section 434 of the Code of Criminal Procedure, the Proceedings of the Acting Head Assistant Magistrate of North Arcot in Case No. 129 of 1870, as contrary to law,

The High Court made the following 1870.

RULING :—In this case the Acting Head Assistant Magistrate convicted the 1st prisoner under Section 457 of the Penal Code, and, finding that he had been previously convicted of an offence punishable under Chapter XVII of the Code, sentenced him to four years' rigorous imprisonment. *November 16.*

The prisoner was convicted under Section 475 of the Penal Code, and, having been previously convicted of an offence punishable under Chapter XVII of the Code, the Magistrate sentenced him to four years' rigorous imprisonment. *Held,* that the Magistrate had power to pass sentence of two years' imprisonment only.

In the Proceedings of the High Court, dated 27th April 1865, it was held that Section 75 of the Penal Code gives no authority to a Magistrate to award imprisonment beyond his ordinary jurisdiction, and that the only Section that gives Magistrates power to pass a sentence of four years is Section 46 of the Code of Criminal Procedure. The present case does not fall within that provision. The sentence of four years is illegal and must be reduced to two years. An amended Calendar must be submitted to the appellate authority.

Appellate Side.

Proceedings, 21st November 1870.

UPON reading a letter, dated 22nd October 1870, from the Session Judge of Tellicherry, forwarding for the orders of the High Court copies of correspondence between himself and the Joint Magistrate; and also a letter, dated 4th November 1870, from the same Officer, forwarding the records in Calendar Case No. 17 of 1870 on the file of the Joint Magistrate for revision as directed in the Proceedings of the High Court, dated 28th October 1870, 1870. *November 21.*

The High Court made the following

RULING :—A complaint was laid against one Chatta Sing, a resident in Mysore, for conveying sulphur in the British Territory without a license, an offence punishable under Section 23 of Act XXXI of 1860. The Joint Magistrate held that he had no jurisdiction over the accused person. On review of the records the Session Judge recorded an opinion that the offence was cognizable by the Magistrate, and that the Mysore territory must be held to be part of British India within the meaning of Section 3 of the Criminal Procedure Code.

The Joint Magistrate of Tellicherry has no jurisdiction to try a resident of Mysore for criminal acts done in Mysore.

1870. November 21. The High Court are clearly of opinion that the Session Judge is wrong in his view of the law. That Mysore is no part of British India was expressly decided in the case of *Reg.* v. *Watkins*, reported at 2 *High Court Reports, page* 444. The accused person in the present case being a resident of a foreign territory and all his acts having been done there, the Joint Magistrate had clearly no jurisdiction over him.

Appellate Side.

Proceedings, 28th November 1870.

1870. November 28. UPON reading a letter, dated the 12th November 1870, from the Session Judge of Calicut, referring for the orders of the High Court under Section 434 of the Code of Criminal Procedure, the Proceedings of the Acting Head Assistant Magistrate of Malabar in the case of *Tanoor Krishna Nair* v. *Tanoor Korachen Nair*, as contrary to law,

The High Court made the following

A Magistrate, proceeding under Section 318 of the Code of Criminal Procedure, is bound to examine any witnesses tendered in support of the respective claims to actual possession of the land in dispute before passing an order.

RULING:—In this case the Head Assistant Magistrate recorded proceedings under Section 318 of the Code of Criminal Procedure to the effect that he was satisfied that a breach of the peace was likely to ensue, and called on the parties to put in their respective statements. On a perusal of the statements and without examining any witnesses, he passed an order under Section 319, for attaching the object of dispute until a competent Civil Court should have determined the rights of the parties.

The Magistrate was bound to examine any witnesses who were tendered in support of the respective claims to actual possession of the land in dispute before passing an order, the prerequisite of which was that he could not ascertain the fact. The order of the Magistrate must be set aside, and he must be directed to proceed in due course.

Appellate Side.

Proceedings, 28th November 1870.

UPON reading a letter, dated the 16th August 1870, No. 407, from the Officiating Magistrate of Kristna District, referring for the orders of the High Court under Section 434 of the Code of Criminal Procedure, the Proceedings of the 1st Class Subordinate Magistrate of Repalli in Case No. 117 of 1870, as contrary to law.

1870. *November* 28.

The High Court made the following

Intention to evade payment of Stamp duty is not an essential ingredient in the offence described by Section 29 of Act XVIII of 1869. *Held*, that the donor under a deed insufficiently stamped was properly convicted, but that the donee had committed no offence under the Section.

RULING :—In this case two persons were convicted by the Subordinate Magistrate under Section 29 of Act XVIII of 1869 for executing a deed of gift of immoveable property on an insufficient stamp and sentenced to pay a fine of one Rupee each. The first defendant is the donor, the second defendant the donee, under the deed.

The Magistrate refers the case on the ground that the Subordinate Magistrate should have levied the full amount payable on the document in addition to the fine, but doubts whether the conviction is sustainable, the Subordinate Magistrate having found that there was no intention to evade payment. He further points out that Section 29 of the Act can have no reference to the donee under a deed of gift.

The High Court observe that Section 20 has reference only to a Civil Court, and that its provisions are purely fiscal and inapplicable to a criminal prosecution. Intention to evade payment is not an essential ingredient in the offence described by Section 29. The conviction of the first defendant is therefore sustainable. But the second defendant, the donee, was not liable to punishment under Section 29 which provides only for any person making, signing or executing otherwise than as a witness. The conviction of the 2nd defendant must be quashed and the fine levied refunded.

Appellate Side.

Proceedings, 28th November 1870.

1870. *November 28.* THE High Court made the following

Annulling Rule of Practice contained in the Proceedings of the late Sadr Court, dated 25th August 1823, relative to the summoning of Public Officers and containing directions on the subject.

ORDER:—It is ordered by the High Court of Judicature at Madras that the Rule of Practice contained in the Proceedings of the late Sadr Court, dated 25th August 1823, relative to the summoning of public Officers, be hereby annulled. The Courts must in future be guided, as in the case of other witnesses, by the provisions of the Code of Civil Procedure. In fixing the time for the attendance of a public Officer as a witness, or in granting the indulgence of an adjournment for that purpose, the fullest consideration must be given to the exigencies of the public duties of the Officer summoned.

Appellate Side.

Proceedings, 1st December 1870.

1870. *December 1.* UPON reading a letter, dated 27th October 1870, from the Session Judge of Guntoor, requesting permission to destroy at the end of each Calendar year the Calendars and Proceedings received from the Magistracy,

The High Court made the following

Duplicates of Calendars sent by the Magistrate to the Session Court should be retained in the Session Court for a period of three years, after which they may be destroyed or returned to the Magistrates' offices.

ORDER:—The High Court observe that the Calendars and Proceedings of the Magistracy which are sent to the Court of Session are not properly speaking records. The originals which are retained in the Magistrates' Courts are the only official records. But there is reason to believe that the originals are frequently written in a slovenly and illegible manner, and there is therefore an advantage in retaining the duplicates at all events for a limited period. In the opinion of the High Court it will be sufficient to fix that period at three years, and the duplicates can then be destroyed or returned to the Magistrates' offices if required.

The High Court take this opportunity of impressing upon the District and Divisional Magistrates that it is a part of their duty to see that proper Office copies of Calendars and Proceedings are kept in their own Office and in those of the Subordinate Magistracy. The importance of so arranging these records that they can be at any time referred to cannot be over-estimated. 1870. *December* 1.

Appellate Side.

Proceedings, 5th December 1870.

UPON reading a letter, dated the 23rd September 1870, from the Acting Joint Magistrate in charge of Salem District, referring for the orders of the High Court under Section 434 of the Code of Criminal Procedure, the Proceedings of the Assistant Magistrate of Salem in Case No. 1 of 1870, as contrary to law, 1870. *December* 5.

The High Court made the following

A deaf and dumb prisoner was convicted of an offence. Upon the trial no attempt was made to communicate with the prisoner respecting the charge against him. The High Court quashed the conviction.

RULING :—In this case a deaf and dumb prisoner in the Salem Subsidiary Jail, under trial on a charge of Theft, was convicted of escaping from lawful custody and sentenced to one month's rigorous imprisonment.

The Joint Magistrate was of opinion that there had been no proper trial, the subject of the charge not having been communicated to the prisoner.

The Proceedings of the Magistrate, in conducting the trial without making any attempt to communicate with the prisoner, were clearly wrong, and the High Court are unable to say that the prisoner was not prejudiced by the irregularity. The conviction must be quashed, but in the opinion of the High Court it is not advisable to direct a new trial.

Appellate Side.

Proceedings, 8th December 1870.

UPON reading a letter, dated the 25th November 1870, from the Session Judge of Salem, referring for the orders of the High Court under Section 434 of the Code of Criminal Procedure, the Proceedings of the Acting Head Assistant Magistrate of Salem, in Criminal Appeal No. 41 of 1870, as contrary to law, 1870. *December* 8.

1870. *December* 8.

The High Court made the following

RULING:—In this case the Head Assistant Magistrate, in disposing of an appeal, at first reversed the Sub-Magistrate's decision and directed the release of the appellant. Subsequently, on re-consideration, he re-called this order and confirmed the Sub-Magistrate's decision. The Magistrate, being called on for explanation, justified his procedure by a reference to the Proceedings of 29th March 1870, in which it was held that a Magistrate is at liberty to amend his sentence at any time before the despatch of the Calendar to the appellate authority.

In disposing of an appeal the Magistrate at first reversed the Sub-Magistrate's decision and directed the release of the appellant; subsequently he re-called this order and confirmed the Sub-Magistrate's decision. *Held*, that the second order of the Magistrate ought to be set aside, and the original order restored.

The High Court observe that the Rule of Practice laid down in the Proceedings of the High Court, dated 21st March 1868 and 29th March 1870, was that a Magistrate is authorized to amend his sentence within a certain period. It does not authorize a Magistrate to amend his finding or to over-ride the clear provision of Section 55 of the Code of Criminal Procedure. The second order of the Magistrate must be set aside and the original order restored.

Appellate Side.

Proceedings, 8th December 1870.

1870. *December* 8.

THE following Official Memorandum was promulgated.

It having been suggested that the summary of the ruling of the High Court of 24th March 1869 under the head *Complaint* 6 in the Digest of Rules, Rulings, and Decisions on matters of Practice and Procedure (Criminal) is not borne out by the Proceedings and is liable to mislead, it is requested that the following summary may be substituted.

"In cases triable under Chapter XIV, where a Magistrate, "on account of the non-appearance of the complainant or for any "other sufficient cause, is satisfied that the charge cannot be sub-"stantiated, he may dismiss the complaint. The dismissal will "not bar the complaint being again entertained."

Appellate Side.

Proceedings, 9th December 1870.

UPON a question put by the Acting Civil Judge of Coimbatore, referring for the opinion of the High Court the question whether the registration of a deed of division of immoveable property of the value of more than Rs. 100, executed by members of an undivided Hindu family, is compulsory under Clause 2, Section 17 of the Indian Registration Act XX of 1866, or whether such deed comes under the term "Instrument of Partition" in Clause 7, Section 18 of the said Act,

1870. *December 9.*

The High Court passed the following

The registration of a deed of division of immoveable property of the value of more than Rs. 100, executed by members of an undivided Hindu Family, is optional under Clause 2, Section 17 of Act XX of 1866, and a suit will not lie to compel registration.

RULING :—It appears to the High Court that the registration is optional and that the Judge is therefore right in thinking that a suit will not lie to compel the registration.

Appellate Side.

Proceedings, 13th December 1870.

UPON reading a letter, dated the 29th November 1870, from the Acting Session Judge of Bellary, referring for the orders of the High Court, under Section 434 of the Code of Criminal Procedure, the Proceedings of the Assistant Magistrate of Bellary, dated 25th November 1870, as contrary to law,

1870. *December 13.*

The High Court made the following

A Magistrate has no jurisdiction to order a sum of money deposited under Section 228 of the Code of Criminal Procedure, for the refund of which an application was made, to be credited to Government.

RULING :—An application was made to the Assistant Magistrate to order the refund of 16 Rupees deposited under the provisions of Section 228 of the Code of Criminal Procedure. The Assistant Magistrate directed the money to be credited to Government. The Session Judge refers the order as illegal.

In the absence of any provision authorizing a forfeiture to Government, the order of the Assistant Magistrate is clearly er-

1870. *December* 18. roneous and must be cancelled. The deposit should be returned to the Jailor in trust for the depositors or paid to any person authorized by the depositors to receive it.

Ordered accordingly.

Appellate Side.

Proceedings, 22nd December 1870.

1870. *December* 22. UPON reading again a letter, dated the 27th September 1870, from the Magistrate of Cuddapah, referring at the request of the Head Assistant Magistrate for the orders of the High Court, under Section 434 of the Code of Criminal Procedure, the Proceedings of the Sub-Magistrate of Pullampett in Case No. 192 of 1870, as contrary to law ; also the records of the above case submitted in accordance with the Proceedings of this Court, dated 21st October 1870,

The High Court made the following

The accused was convicted upon a charge that he, being summoned as a defendant in a case of trespass, left the Court without permission and thereby disobeyed the Summons. The Sub-Magistrate gave the accused a verbal order to appear when required, but the Magistrate did not adjourn the case to any particular day. *Held*, that the conviction was bad.

RULING:—In the case referred the Sub-Magistrate has convicted the accused for disobedience to a summons and sentenced him to a fine of 5 Rupees. The charge sets out that the accused being summoned as a defendant in a case of trespass left the Court without permission after making appearance and thereby disobeyed the summons.

The Sub-Magistrate appears to have given a verbal order to the defendant to appear when required, but he did not adjourn the trial to any particular day, and it is sufficient to say that the accused is not now charged with disobedience of any verbal order.

In the present case there was no disobedience of a lawful order. The conviction should be quashed, and the fine levied refunded.

Ordered accordingly.

Appellate Side.

Proceedings, 23rd December 1870.

1870. *December* 23.

UPON reading Proceedings of the Session Court of Bellary, dated the 3rd December 1870, reviewing (on appeal) the Proceedings in Calendar Case No. 402 of 1870 on the file of the Cantonment Magistrate of Bellary,

The High Court made the following

The Report of the Chemical Examiner to Government may be acted upon as evidence by all Criminal Courts by virtue of Section 380 A of the amended Code of Criminal Procedure.

RULING :—The Session Judge observes :—" The Chemical Ex- " aminer's Report could not be read " and acted upon as evidence by the " Cantonment Magistrate. It could " only be used in evidence at a " trial before a Court of Session (vide " Section 370, Criminal Procedure Code)."

This opinion is at variance with Section 380 A, of the amended Code, which extends Section 370 to all Criminal Courts, and the Proceedings should be revised by the Session Judge.

Appellate Side.

Proceedings, 4th January 1871.

1871. *January* 4.

UPON reading a letter, dated 6th December 1870, from the Magistrate of the Godavery District, requesting the High Court, with reference to the Proceedings, dated 21st October 1870, to rule whether toddy is liquor within the meaning of Act III of 1864 at the moment when it is taken from the tree,

The High Court made the following

The High Court in their Proceedings, dated the 21st October 1870, did not intend to define toddy as a matter of law.

RULING :—The High Court, solely on the construction of a Magistrate's finding referred as bad in law, gave their opinion that toddy is *primâ facie* fermented palm juice. The very words *primâ facie* showed that the Court does not intend to define toddy as matter of law.

They are not prepared to do so now.

Appellate Side.

Proceedings, 5th January 1871.

1871. *January* 5.

UPON reading a letter, dated 1st December 1870, from the Session Judge of Mangalore, referring for the orders of the High Court the question whether copies of summary of evidence can be furnished to parties desirous of appealing on plain paper under the provisions of the Notification of the Government of India, dated 19th September 1870,

The High Court made the following

The exemption of the Government of India, dated the 19th September 1870, cannot be extended to copies of the statement of evidence and grounds of conviction. Persons desirous of obtaining copies of such documents for the purpose of appeal must furnish stamped paper on which the copies are to be written.

RULING :—The exemption of the Government of India refers to final sentences or orders which alone it is necessary for a party to present with his Petition of Appeal under Section 416 of the Code of Criminal Procedure. It cannot, in the opinion of the High Court, be extended to copies of the statement of evidence and grounds of conviction.

Appellate Side.

Proceedings, 6th January 1871.

1871. *January* 6.

UPON reading the Proceedings of the Session Court of Bellary, dated the 1st November 1870, reviewing (on appeal) the Proceedings in Calendar Case No. 24 of 1870, on the file of the Deputy Magistrate in charge of the Hurpunhully Division,

The High Court passed the following

The defendant was convicted of cheating. He applied to the Tahsildar for a specified quantity of land on cowle tenure free of tax for five years, and falsely represented that the land was waste land. *Held*, a good conviction.

RULING :—In Calendar No. 24 on the file of the Deputy Magistrate, the 1st defendant was convicted of cheating for having applied to the Tahsildar of Hadgally for 23 acres of land on cowle tenure free of tax for five years, and having falsely represented that the lands applied for were waste lands, and the 2nd defendant was convicted of abetting the said offence.

On appeal the Session Judge reversed these convictions on the ground that the act of the 1st defendant did not amount to cheating, because no damage would have been sustained or was likey to be sustained by the person deceived.

1871. January 6.

The High Court are unable to concur in the Session Judge's view of the law. The Tahsildar was admittedly deceived by the 1st defendant's misrepresentation and forwarded the application of the 1st defendant to his superior. Nothing was more likely to damage the reputation of the Tahsildar with his immediate superiors than forwarding such an application, which, if complied with, would have resulted in a considerable loss of revenue to Government and might have laid the Tahsildar open to suspicion of having colluded with 1st defendant to defraud the Government.

The findings of the Session Judge upon the facts being coincident with the findings of the Deputy Magistrate and his judgment of acquittal being erroneous in point of law as shown above, the conviction and sentence by the Magistrate must be restored.

Ordered accordingly.

Appellate Side.

Proceedings, 9th January 1871.

1871. January 9.

UPON reading a letter, dated the 25th November 1871, No. 62, from the Session Judge of Calicut, referring, for the orders of the High Court, under Section 434 of the Code of Criminal Procedure, the Proceedings of the Assistant Magistrate of Malabar in Magisterial Petition No. 348 of 1870, as contrary to law,

The High Court made the following

The actual possession intended by Chapter XXII of the Code of Criminal Procedure does not include the occupancy of a mere trespasser.

RULING :—In this case the Assistant Magistrate held proceedings under Chapter XXII of the Code of Criminal Procedure, and declared the petitioners to be in possession and entitled to hold possession.

The Session Judge refers the order as illegal on the grounds (1) that the petitioners had, in their complaint, admitted possession though possibly a wrongful possession by their opponents: (2) that the Magistrate had decided the question of possession without examining the parties' witnesses.

The High Court are of opinion that there is no ground for their interference. The actual possession intended by the Code of Criminal Procedure does not include the occupancy of a mere

1871. *January* 9.

trespasser. There was evidence upon which the Magistrate might find that the petitioners had been up to a recent period in actual possession of the property, and there was no evidence of abandonment.

Appellate Side.

Proceedings, 9th January 1871.

1871. *January* 9.

UPON reading a letter, dated the 14th December 1870, from the District Magistrate of Salem referring at the request of the Acting Joint Magistrate for the orders of the High Court, under Section 434 of the Code of Criminal Procedure, an order passed by the Sub-Magistrate of Pennagaram, dated 10th September 1870, as contrary to law,

The High Court made the following

The defendant was convicted of contempt of Court under Section 163 of the Code of Criminal Procedure for having refused to sign a deposition given by him as a witness in the course of a revenue inquiry. The High Court set aside the conviction.

RULING :—In this case the Deputy Tahsildar convicted the accused for contempt of Court under the provisions of Section 163 of the Code of Criminal Procedure for having refused in the course of a Revenue inquiry to sign a deposition given by him as a witness, and sentenced him to pay a fine of 50 Rupees, an amount subsequently reduced to 15 Rupees.

The Joint Magistrate refers the case on the grounds, (1) that the defendant was not legally bound to sign his deposition ; (2) that the Deputy Tahsildar was not at the time holding a legal Court ; he not having been specially authorized to conduct the Revenue inquiry as required by Regulation VII of 1828.

The action of the Deputy Tahsildar appears to have been illegal on the first ground stated by the Magistrate. The conviction must be quashed and the fine levied refunded.

Ordered accordingly.

Appellate Side.

Proceedings, 9th January 1871.

1871. *January* 9.

UPON reading a letter, dated the 9th December 1870, No. 245, from the Acting Session Judge of Tanjore, referring for the orders of the High Court, under Section 434 of the Code of Criminal Procedure, an order passed by the Assistant Magistrate of Tanjore under Section 67 of the Criminal Procedure Code as contrary to law,

The High Court made the following

Sanction was given by the Magistrate for the institution of Criminal proceedings against the defendant for having made a false charge against the complainant. The Magistrate dismissed the complaint on the ground that the complainant had taken no step to prosecute for three months after the sanction was obtained. *Held*, that the Magistrate had power to dismiss the complaint.

RULING :—In this case sanction had been given by the Deputy Magistrate for the institution of criminal proceedings against the defendant for having preferred a false charge against the complainant. In the course of the inquiry the Assistant Magistrate found that the complainant could give no satisfactory explanation of his delay in coming forward to prosecute for more than three months after sanction had been given, and dismissed the complaint under Section 67 of the Code of Criminal Procedure.

The Session Judge refers the order of dismissal as illegal on the ground that Section 67 was inapplicable, process having been issued to compel appearance of the defendant; and, with reference to the judgment of the High Court in Criminal Petition 221 of 1870, suggests that the fact of delay is not a ground for refusing to hear the evidence that the defendant might be prepared to adduce.

The High Court are of opinion that there is no ground for their interference. Under the provisions of Section 249, which applies the provisions of Section 180 to trials under Chapter XIV, the Assistant Magistrate had discretion to dismiss the complaint if, in his judgment, there was no sufficient ground for proceeding with it. This discretion he appears to have exercised in the present case, and there is nothing contrary to law in the order of dismissal, though Section 67 was wrongly quoted.

Appellate Side.

Proceedings, 11th January 1871.

1871. *January* 11.

UPON reading a letter, dated the 16th December 1870, from the Magistrate of Salem, referring at the request of the Assistant Magistrate for the orders of the High Court, under Section 434 of the Code of Criminal Procedure, the Proceedings of the 2nd Class Sub-Magistrate of Razipur in Case No. 486 of 1870, as contrary to law,

The High Court made the following

The Magistrate convicted the defendant of contempt of Court under Section 163 of the Code of Criminal Procedure and sentenced him to pay a fine of Rs. 10, or in default two days' imprisonment. *Held*, that the Magistrate had not exceeded his powers.

RULING :—In this case the Subordinate Magistrate has convicted the accused of contempt of Court under the provisions of Section 163 of the Code of Criminal Procedure and sentenced him to pay a fine of 10 Rupees or in default to be imprisoned in the Civil jail for two days. The Assistant Magistrate refers the case on the ground that the sentence to imprisonment in default of payment of fine is illegal by virtue of the express provision of Section 163 that "in no case tried under this Section "shall a Magistrate adjudge imprisonment for any contempt "committed in his own presence against his own Court."

The High Court are of opinion that there is no ground for their interference. The necessity for commitment to another Magistrate arises only where the Court thinks imprisonment without the option of fine, or a fine of more than 200 Rupees, demanded by the circumstances of the case.

Appellate Side.

Proceedings, 23rd January 1871.

1870. *January* 23.

UPON reading a letter, dated the 13th December 1870, No. 42, from the Acting Session Judge of Chittoor, referring for the orders of the High Court, under Section 434 of the Code of Criminal Procedure, an order of commitment made by the Assistant Magistrate, as contrary to law,

The High Court made the following

1871.
January 23.

RULING:—In this case the Assistant Magistrate (a 2nd Class Sub-Magistrate) committed for trial before the Court of Session three persons on charges of robbery and theft under Sections 392 and 379 of the Penal Code. The Session Judge is of opinion that the commitment is bad because neither of these offences is exclusively triable by the Court of Session, and Section 356 of the Code of Criminal Procedure only empowers a Sub-Magistrate to commit such cases.

A commitment by a Subordinate Magistrate to the Session Court with respect to offences not exclusively triable by the Session Court is good.

In the Proceedings of the High Court, dated 24th April 1865, it was held that by Section 356 all Sub-Magistrates, by virtue of their appointment, are empowered to prepare and commit cases for trial before the Court of Session. In the opinion of the High Court Chapter XXIV was intended to conserve the powers of Sub-Judges and Principal Sadr Amíns in this Presidency, and the directions as to the tribunals to which commitments are to be made are only ancillary to that purpose and do not narrow the powers given by Section 179, which gives two classes of cases in which all persons authorized to commit to the Court of Session may commit. These are (1) where they are exclusively triable,
(2) where in his opinion they ought to be tried.

It follows, therefore, that Section 359, construed with reference to the object of the Chapter, merely provides against cases exclusively triable by the Court of Session being committed to the Principal Sadr Amín or Sub-Judge, as was the case with the procedure under the old law. This is not a narrowing but an enabling clause providing for the continuance of a jurisdiction which, without it, would have disappeared, and settling the mode in which the Sub-Magistrates are to do the work preparatory to the exercise of it. On this view the commitment in the present cases is perfectly good and there is no ground for interference.

Appellate Side.

Proceedings, 1st *February* 1871.

1871. *February* 1.

UPON reading certain Proceedings of the Session Court of Bellary, reviewing the Proceedings of the Assistant Cantonment Magistrate in Calendar Case No. 721 of 1870.

The High Court made the following

Defendant was charged, under Sec. 108 of Madras Act X of 1865, with having used a place not licensed by the Municipal Commissioners as a slaughter-house. The finding on the facts was that defendant slaughtered a sheep on his own premises for his own private purpose. *Held*, no evidence of the offence charged.

A Magistrate is not authorised to alter his finding once recorded.

RULING:—In this case the defendant was charged, under Section 108 (a) of Madras Act X of 1865, with having used a place not licensed by the Municipal Commissioners as a slaughter-house.

The Assistant Cantonment Magistrate in the first instance found the accused person guilty, sentenced him to pay a fine of 5 Rupees and recovered the amount by distress. Subsequently, and before the submission of the Calendar to the Appellate authority, the same Magistrate cancelled his former finding, acquitted the defendant and directed the refund of the fine.

In the Proceedings of the High Court, dated 8th December 1870, it was held that a Magistrate is not authorised to alter his finding once recorded, and that the Rule of Practice contained in the Proceedings of 21st March 1868 and 29th March 1870, only allows him to amend his sentence. The second finding in this case is, therefore, illegal, and must be set aside. The result of this is to restore the first finding, which, however, is also contrary to law. The finding on the facts is that the defendant slaughtered a sheep on his own premises for his own private purpose. In the opinion of the High Court this is not the using of the place as a slaughter-house. It would, of course, have been open to the Legislature to say that no beast should in any case be slaughtered except in a public slaughter-house, but they have not done so. Etymologically the word slaughter-house means a place used for

(a) "No place shall be used as a slaughter-house within any Town unless licensed by the Municipal Commissioners. And whoever, without such license, uses, as a slaughter-house, any place within the Town, shall be liable to a penalty not exceeding 50 Rupees, and to a further penalty not exceeding 10 Rupees, for every day after the conviction for such offence during which the said offence is continued."

the preparation of beasts for the market, and this place was not so used. Holding that there is no evidence of an offence under Section 108 of Madras Act X of 1865, the High Court quash the conviction and direct the refund of the fine. 1871. *February* 1.

Appellate Side.

Proceedings, 10*th February* 1871.

UPON reading a letter, from the Session Judge of Mangalore, referring the Proceedings of the Assistant Magistrate of South Canara, in Case No. 81 of 1870, and also the record in the said case, 1871. *February* 10.

The High Court made the following

Accused was Ejman of complainant's family. Complainant obtained a decree setting aside an alienation made by accused. In execution, complainant obtained possession from the alienee. The accused entered on this land. *Held*, that he had not committed the offence of criminal trespass.

RULING:—In this case the Assistant Magistrate convicted the accused of criminal trespass and sentenced him to pay a fine of 5 Rupees. The facts proved were that the accused was Ejman of the complainant's family, and that complainant brought a suit and obtained a decree setting aside an alienation made by the accused.

In execution of that decree the complainant obtained possession from the alienee. The accused entered on this land and was convicted of criminal trespass. The Session Judge referred the case, on the ground that, on the facts found, no offence was committed.

The High Court are of opinion that the conviction cannot stand. The decree merely declares the right of the plaintiff's family, and if the defendant was turned out of possession in execution of that decree, he was wrongfully ejected. His resuming of ti may have been a resistance of a lawful though wrongful order, but is manifestly not the offence defined in this section.

Appellate Side.

Proceedings, 23rd February 1871.

1871. *February* 23.

THE following Order was this day promulgated.—

It is ordered by the High Court of Judicature at Madras, that the form of warrant of imprisonment on failure to pay maintenance prescribed by the High Court in November 1868 (Vide p. 18 of the Forms) be amended by omitting the word "Civil" before "Jail."

Appellate Side.

Proceedings, 21st March 1871.

1871. *March* 21.

UPON reading the record of the Case No. 28 of 1870 on the file of the Session Court of Tranquebar,

The High Court made the following

A Hindu priest was charged with knowingly and wilfully solemnizing a marriage between persons one of whom professed the Christian religion, the said priest not being duly authorized under Section 6 of Act V of 1865, an offence punishable under Section 56 of the same Act. The Session Judge discharged the accused without trial on the ground that the enactment in question was inapplicable to the celebration of a marriage according to the Hindu form by a Hindu priest, though one of the contracting parties was a Christian convert. *Held*, that this view of the law was erroneous and that the accused was *primâ facie* liable under Section 56 of the Act.

RULING:—In this case a Hindu priest was committed for trial on a charge of knowingly and wilfully solemnizing a marriage between persons one of whom professed the Christian religion, the said priest not being duly authorized under Section 6 of Act V of 1865, an offence punishable under Section 56 of Act V of 1865.

The Session Judge discharged the accused, without trial, on the grounds that the enactment under which the charge was framed was inapplicable to the celebration of a marriage according to the Hindu form by a Hindu priest, though one of the contracting parties was at the time a Christian convert, but was intended solely to prevent any question relative to the validity of a class of Christian marriages which had previously stood in a doubtful position.

The legality of this discharge without trial has been considered by the full Court, and a majority are of opinion that the Session Judge's view of the law is erroneous. 1871. *March* 21.

The preamble *(a)* of the Act does not limit the scope of the act to marriages solemnized in a Christian form. Section 5 *(b)* expressly prohibits the performance of any form of marriage between persons, one or both of whom profess the Christian religion except by the *persons* authorized by Section 6. Without failing to give due effect to this provision, Section 56 *(c)* cannot be restricted to the solemnization of marriage in any other than the prescribed forms by an authorized person or in one of the prescribed forms by an unauthorized person. The words are general and must be read as co-extensive with the prohibition in Section 5.

It follows that, in the present case, the priest who solemnized a marriage between parties of whom the woman admittedly professed the Christian religion was *primâ facie* liable under Section 56 of the Act, and that the trial should have proceeded. In the circumstances and considering the length of time that has elapsed, the High Court do not think it expedient to direct a new trial.

Appellate Side.

Proceedings, 29th March 1871.

UPON reading a letter from the Acting Session Judge of Tranquebar, referring, for the orders of the High Court, under Section 434 of the Code of Criminal Procedure, the order of the Head Assistant Magistrate in Criminal Petition No. 45 of 1871, as contrary to law, 1871. *March* 29.

(a) "Whereas it is expedient to provide further for the solemnization of marriages in India of persons professing the Christian religion; it is enacted as follows:"—

(b) Sec. 5. "From and after the commencement of this Act no marriage between persons, one or both of whom shall profess the Christian religion, shall be solemnized, unless in accordance with the provisions of the next following Section."

Sec. 6 [directs by what persons marriages may be solemnized.]

(c) Sec. 56. "Whoever, not being authorized under the 6th Section to solemnize a marriage shall, from and after the commencement of this Act, in the absence of a Marriage Registrar of the District in which such marriage is solemnized, knowingly and wilfully solemnize a marriage between persons, one or both of whom shall profess the Christian religion, shall be punished," &c.

1871. March 29. The High Court made the following

RULING :—A complaint was preferred before the Head Assistant Magistrate accusing the District Munsif of Sheally of an offence punishable under Section 219 of the Penal Code. The Head Assistant Magistrate refused to entertain the complaint because the sanction of the local Government had not been obtained under Section 167 *(a)* of the Code of Criminal Procedure.

The sanction of Government is required for the prosecution of any Judge if a complaint is made against him as Judge. Construction of Section 167 of the Criminal Procedure Code.

The Session Judge is of opinion that the Magistrate's interpretation of the law is erroneous, and that Section 167 only requires the sanction of Government for prosecutions against Judges not removable from office without the sanction of Government.

It appears to the High Court that the words in Section 167 "removeable from his office without the sanction of the Government" have reference only to "public servants," and that the sanction of Government is required for the prosecution of any Judge, if a complaint is made against him as Judge. Had the meaning of the section been otherwise, the words "public servant" would have sufficed. All Judges are public servants, but all public servants are not Judges. The Head Assistant Magistrate acted rightly in dismissing the complaint.

Appellate Side.

Proceedings, 19th April 1871.

1871. April 19. UPON a reference, from the Acting Session Judge of Chittoor, of certain Proceedings of the Head Assistant Magistrate of North Arcot, as contrary to law,

(a) Section 167 provides that "a charge of an offence punishable under the Indian Penal Code, of which any Judge or any public servant not removable from his office without the sanction of the Government, is accused as such Judge or other public servant, shall not be entertained against such Judge or public servant, except with the sanction or under the direction of the local Government, or of some Officer empowered by the local Government or of some Court or other authority to which such Judge or other public servant is subordinate, and whose power so to sanction or direct such prosecution, the local Government shall not think fit to limit or reserve."

The High Court made the following 1871. *April* 19.

RULING:—In this case the Head Assistant Magistrate issued a warrant, under Section 316 of the Code of Criminal Procedure, for the collection of 15 months' arrears of maintenance which one Ghúlam Hussain had been ordered to pay to his wife.

The issue of a warrant under Section 316 of the Code of Criminal Procedure is permissible for every breach of an order of maintenance made under that section, but there seems no ground for saying that a defendant can get out of his liability for any payment by the failure to issue a warrant for the levy of that payment. The result of issuing it for an aggregate of payments is that one month's imprisonment would alone be awardable in default.

No steps had been taken to enforce the order for maintenance since August 1867 until the present application was made. The Session Judge refers the order as illegal, on the ground that the Magistrate is not empowered by the section to levy in one proceeding arrears of maintenance, but must issue a separate warrant on every breach.

The High Court are not prepared to say that the order of the Head Assistant Magistrate is illegal. A warrant is permissible for every breach of the order, but there seems no ground for saying that the defendant can get out of his liability for any payment by the failure to issue a warrant for the levy of that payment.

The result of issuing it for an aggregate of payments is that one month's imprisonment would alone be awardable in default.

There seems no ground in reason or law for defendant being permitted further to benefit by his disobedience and the complainant's neglect.

Appellate Side.

Proceedings, 20*th April* 1871.

UPON reading a letter from the Judge of the Court of Small Causes at Vellore, requesting instructions whether notes of judgment furnished to parties, in accordance with Section 37 of the Rules of Practice for the guidance of Small Causes Courts, are required to be on stamp paper, 1871. *April* 20.

1871. April 20.

The High Court made the following

RULING:—The High Court are of opinion that notes of judgment furnished to parties under the Rules of Practice abovementioned are copies of decrees and require a stamp, under Article VII of Schedule I of Act VII of 1870.

Notes of judgment furnished to parties under the Rules of Practice for the guidance of Small Causes Courts are copies of decrees and require a stamp under Article VII, Schedule I of Act VII of 1870.

Appellate Side.

Proceedings, 26th April 1871.

1871. April 26.

UPON a reference by the Magistrate of Coimbatore of certain Proceedings of the 1st Class Sub-Magistrate of Darapuram Taluq,

The High Court made the following

RULING:—In this case the defendant, a goldsmith, had received in advance a quantity of gold and silver money and had contracted to make and deliver within a fixed time an idol, &c. On defendant's failing to do so, a complaint was made before the Sub-Magistrate, who passed an order directing defendant to complete the work within 7 days, or, in default, to be rigorously imprisoned for 10 days.

On the construction of Section 2 of Act XIII of 1859: *Held*, that gold or silver money given to an Artificer as raw material wherewith to make the article contracted for, is an "advance of money" within the meaning of the section. *Held* also, that a sentence of imprisonment should not be announced beforehand in the order directing performance of the contract, but should follow on a complaint of non-compliance.

The Joint-Magistrate was of opinion (1) that the case did not fall within the provisions of Section 2, *(a)* Act XIII of 1859,

(*a*) Section 2, Act XIII of 1859, is "If it shall be proved to the satisfaction of the Magistrate that such artificer, workman, or laborer has received money in advance from the complainant on account of any work, and has wilfully and without lawful or reasonable excuse neglected or refused to perform or get performed the same according to the terms of his contract, the Magistrate shall, at the option of the complainant, either order such artificer, workman, or laborer to repay the money advanced, or such part thereof as may seem to the Magistrate just and proper, or order him to perform or get performed, such work according to the terms of his contract; and if such artificer, workman, or laborer shall fail to comply with the said order, the Magistrate may sentence him to be imprisoned with hard labour for a term not exceeding three months, or if the order be for the re-payment of a sum of money, for a term not exceeding three months, or until such sum of money shall be sooner repaid; provided that no such order for the re-payment of any money shall, while the same remains unsatisfied, deprive the complainant of any Civil remedy by action or otherwise which he might have had but for this Act."

inasmuch as the money advanced appeared to have been advanced not in payment of the work to be done but merely as raw material for the idol, &c.; (2) that the order directing imprisonment before a second complaint or non-compliance with the Sub-Magistrate's order was illegal. 1871. *April 26.*

The High Court cannot agree with the Joint-Magistrate that the case was not one falling within the scope of Section 2, Act XIII of 1859. The fact that the money was perhaps, and this is not clear, to be used as raw material, does not, in their opinion, prevent it from being an advance.

The second part of the Sub-Magistrate's order is, however, clearly illegal. The imprisonment should not have been announced beforehand, but should have followed on a complaint of non-compliance, to which the defendant might have had a satisfactory defence. The part of the Sub-Magistrate's order, therefore, which directs imprisonment must be quashed.

Appellate Side.

Proceedings, 28th March 1871.

UPON a reference by the Magistrate of Kurnool, of the Proceedings of the Sub-Magistrate of Sirwell in Case No. 66 of 1870, as contrary to law; 1871. *March 28.*

The High Court made the following

Defendant was convicted of criminal trespass for having enclosed and commenced to cultivate a portion of a burial ground. *Held*, that the conviction was right. The person (corporate) in possession of the burial ground is the portion of the public entitled to use the burial ground and the act of ploughing up the burial ground was evidence of intent to annoy such person, the defendant not being one of the portion of the public entitled to its use.

RULING:—In this case the defendant was convicted by the Sub-Magistrate of criminal trespass for having enclosed and commenced to cultivate a portion of a burial ground. The Magistrate referred the case for the orders of the High Court on the ground that there was no proof against the defendant of any of the intents essential to the offence. *(a)*

(a) Section 441 of the Penal Code defines criminal trespass as follows:— "Whoever enters into or upon property in the possession of another, with intent to commit an offence or to intimidate, insult, or annoy any person in possession of such property; or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult, or annoy any such person, or with intent to commit an offence, is said to commit criminal trespass.

1871. *March 28.* The High Court take the facts to be that the defendant has illegally appropriated to his own use ground devoted to common and sacred uses. The person (corporate) in possession of the burial ground is the portion of the public entitled to use the burial ground, and the High Court are of opinion that there was evidence of an intent to annoy such person, for the intent of the defendant must be inferred from the nature of his acts and it is scarcely possible to conceive any act more calculated to cause annoyance, especially to superstitious people attaching sanctity to the relics of mortality, than the act of ploughing up a burial ground. The defendant himself does not attempt to justify his proceeding. He admits that his entry upon the ground was wrongful, and we have ascertained from the Magistrate that he is not one of the portion of the public entitled to its use, and it is therefore unnecessary in the present case to consider whether, if the fact were otherwise, it would make any difference. In these circumstances the High Court are of opinion that the offence of Criminal trespass is made out and that the conviction must be upheld.

Appellate Side.

Proceedings, 25th May 1871.

1871. *May 25.* UPON a reference by the Magistrate of Coimbatore of the Proceedings of the 1st Class Sub-Magistrate of Darapúram, in Case No. 35 of 1871.

The High Court made the following

Defendant was convicted of criminal trespass for including in his own land a portion of a public foot-path. *Held*, that as the public generally were entitled to the use of the foot-path, there was no illegal entry by the defendant on property in the possession of another with intent to annoy the person in possession, and consequently, that the defendant was wrongly convicted.

RULING:—In this case the Sub-Magistrate convicted the accused of criminal trespass for including in his own land a portion of a public footpath.

The question for the Court's decision is whether the offence of criminal trespass was committed. In a case from Kurnool it was held that enclosing and cultivating a burial ground amounted to criminal trespass, but in that case it was found as a fact that the defendant was not one of the persons entitled to the use of the burial ground. In the present case

the public generally are entitled to the use of the footpath and the High Court are unable to say that there was an illegal entry on property in the possession of another with intent to annoy the person in possession. The defendant might have been convicted of a public nuisance under Section 283 of the Penal Code, or he might have been dealt with under Section 20 of the Criminal Procedure Code. With reference to Section 426 of the Code of Criminal Procedure, it is not necessary to interfere with the conviction or sentence.

1871. *May* 25.

Appellate Side.

Proceedings, 1*st May* 1871.

1871. *May* 1.

UPON reading the record of the case No. 13 of 1871, on the file of the Session Court of Salem, and also the explanation furnished by the Session Judge.

The High Court made the following

The making of any number of false statements in the same deposition is one aggregate case of giving false evidence. Charges of false evidence cannot be multiplied according to the number of false statements contained in the depositions.

RULING:—The Session Judge reports that the perjury of which the prisoner in the above case has been convicted, and for which he has been sentenced to undergo three months' imprisonment at the expiration of the sentence passed on him in Calendar No. 103 of 1870, and in addition to receive 50 lashes with a cat-o'nine tails under Section 4, Act VI of 1864, is a second piece of false evidence given in the same deposition and on the same occasion as the perjury for which the prisoner was convicted in the former case, but that the two pieces of evidence were on distinct matters and given at different stages of the trial.

It appears to the High Court that the making of any number of false statements in the same deposition is one aggregate case of giving false evidence, and that charges of false evidence cannot be multiplied according to the number of false statements contained in the depositions. They are merely instances of the offence. Testing it by the law of evidence, the whole deposition must be looked at, if desired, and one part qualified by the other. The prisoner has, therefore, been twice tried for and convicted of the same offence. The falsity of the second statement was proper evidence on the first trial, but there were not two offences.

The second conviction must be quashed.

Appellate Side.

Proceedings, 23rd May 1871.

1871. *May* 23.

UPON reading an extract from Proceedings of the Session Court of Berhampore, dated 20th April 1871, referring the Proceedings of the District Magistrate of Ganjam in Case No. 16 of 1871, as contrary to law,

The High Court made the following

A person who pledges what is pledged to him may be guilty of criminal breach of trust. There are two elements,—(1.) The disposal in violation of any direction of law or contract, express or implied, prescribing the mode in which the trust ought to be discharged,—(2.) Such disposal dishonestly.

RULING :—In this case the District Magistrate has discharged without trial a person accused of criminal breach of trust. The facts are that the prosecutrix lent or pledged her brass pot to the accused, and that the accused pawned it. The District Magistrate was of opinion that no criminal offence was committed. The Session Judge refers the order of discharge as illegal, on the ground that the facts necessary to constitute the offence of criminal breach of trust or criminal misappropriation of property have been proved.

The High Court are clearly of opinion that a person who pledges what is pledged to him may be guilty of criminal breach of trust. There are two elements. (1.) The disposal in violation of any direction of law or contract, express or implied, prescribing the mode in which the trust ought to be discharged. (2.) Such disposal dishonestly. In the present case, the facts not having been gone into, it is impossible to say whether the first element existed. The High Court cannot, however, agree with the broad proposition laid down by the Magistrate. Supposing the first element to be made out, then there was certainly some evidence of the second, and it is impossible to say that the offence could not in point of law have been committed.

The Judge and the Magistrate are both agreed that the present case requires no further investigation, and undoubtedly great caution ought to be used in drawing the inference of dishonesty from a breach of a duty imposed by Civil law. Whether it should be drawn or not is a question in each particular case. When the law bearing upon the case is doubtful (*Donald* v. *Suckling*, L. R. I. Q. B. 585), it would be most indiscreet to raise the inference of dishonesty against a man who has mistaken it, simply

because he has mistaken it. Where the rule of law is perfectly plain a conviction ought by no means necessarily to follow, but the very violation of the law would be some evidence of the dishonest intent. 1871. *May 23.*

Appellate Side.

Proceedings, 21*st June* 1871.

UPON reading a letter from the Session Judge of Tinnevelly, submitting, that the Rule of Practice to the effect that *all cases in which records may be received and the parties present before the first day of any Session should be tried at such Session* requires modification, 1871. *June 21.*

The High Court made the following

RULING:—The High Court are not prepared to modify the present rule of practice. It is in the power of a Session Judge to keep the Session open if he requires time for the perusal of the records, or to adjourn a trial if the interests of the public or the prisoners require it. At the same time the Magistracy should be cautioned against allowing investigations on preliminary enquiry to be deferred and a number of records transmitted to the Court immediately before the day fixed for the Sessions. Each preliminary enquiry should be conducted to a close as quickly as the circumstances of the case will permit.

Appellate Side.

Proceedings, 1*st August* 1871.

UPON a reference, by the Session Judge of Tanjore, of the Proceedings of the Head Assistant Magistrate of Tanjore, in Case No. 48 of 1871, as contrary to law, 1871. *August 1.*

The High Court made the following

Accused was summoned as a witness in a case to be heard on 27th May. The summons was not served personally on accused, but affixed to the door of his house. On the appointed date the case was not taken up, but was adjourned by public

RULING:—In this case the accused was summoned as a witness in a case to be heard on the 27th May 1871. The summons was not served personally on the accused, but was affixed to the door of his house. On the appointed date the

1871.
August 1.

proclamation until June 5th. On this latter date accused failed to attend. For this he was convicted of an offence under Section 174 of the Penal Code. There was no evidence that the summons had been brought to the knowledge of the accused so as to require him to attend on the first occasion. *Held*, that on the ground of there being no evidence of the commission of an offence the conviction must be quashed.

The adjournment of a trial by public proclamation is irregular and objectionable.

case was not taken up, but was adjourned by public proclamation until the 5th June 1871. On this latter date the accused failed to attend. For this omission he was convicted of an offence under Section 174 of the Penal Code and sentenced to pay a fine of Rupees 5, or in default to be imprisoned for one week.

In referring the conviction as illegal, the Session Judge expressed an opinion that the adjournment of a trial by public proclamation was irregular and objectionable.

The High Court observe that there was not a particle of evidence that the summons was brought to the knowledge of the accused, so as to require him to attend on the first occasion. On the ground, therefore, that there is no evidence of the commission of an offence, the conviction must be quashed and the fine levied refunded.

The High Court concur with the Session Judge in holding that the adjournment of a trial by public proclamation is irregular and objectionable.

In all pending cases it is the duty of the Magistrate to give special notification to the parties of the date to which the case is adjourned.

Appellate Side.

Proceedings, 9th August 1871.

UPON reading Proceedings of the Session Court of Berhampore, reviewing certain Proceedings of the Junior Assistant Magistrate of Ganjam, 1871. *August* 9.

The High Court made the following

Accused, a Police Constable, was convicted under Sec. 44 of Act XXIV of 1859 of ceasing to perform the duties of his office.

The evidence showed that he had gone to sleep while posted as a sentry over the Jail. *Held*, that the accused was not guilty of the particular species of offence of which he was convicted; he was, however, guilty *primâ facie* under the Section.

Going to sleep while on guard is an offence punishable under Sec. 10.

RULING:—In this case, the accused, a Police Constable, was convicted of ceasing to perform the duties of his office, an offence punishable under Section 44 of Act XXIV of 1859 (Police Act), and was sentenced to 3 months' rigorous imprisonment. The evidence showed that the accused had gone to sleep while posted as a sentry over the Jail. The Session Judge referred the conviction as illegal on the ground that the facts alleged against accused did not amount to a ceasing to perform his duties within the meaning of the Section, the ceasing contemplated being a permanent ceasing.

The High Court concur with the Session Judge in holding that the accused was not guilty of the particular species of offence of which he was convicted; he was, however, guilty *primâ facie* under the section. Going to sleep while on guard is doubtless a very serious violation of duty, but in the opinion of the High Court it is one punishable (not which ought to be punished, which was doubtless meant) under Section X. The conviction under Section 44 is clearly illegal and must be quashed and the prisoner discharged from custody.

Appellate Side.

Proceedings, 17th August 1871.

UPON reading a letter from the Session Judge of Salem, referring the Proceedings of the District Magistrate of Salem in Case No. 9 of 1871, 1871. *August* 17.

The High Court made the following

1871. *August* 17.

Defendant was convicted under Section 338 of the Indian Penal Code of causing grievous hurt. The evidence showed that the defendant was being driven in a carriage to her house through the streets of the town between the hours of 7 and 8 P. M. That the carriage was being driven at an ordinary pace and in the middle of the road; that the night was dark and the carriage without lamps, but that the horse-keeper and coachman were shouting out to warn foot-passengers; that the defendant's carriage came into contact with the complainant's father, an old deaf man, and that complainant's father was thereupon knocked down, run over and killed. *Held*, upon a reference, that the question for the Court was whether there was any evidence that the death of the deceased was induced by an act negligently and rashly directed by the accused, and that there was no such evidence. The conviction was accordingly quashed.

RULING:—In this case the defendant was convicted of causing grievous hurt by driving with such negligence as to endanger human life, an offence punishable under Section 338, Indian Penal Code, and was sentenced to pay a fine of Rs. 100.

The evidence showed that the defendant was being driven in a carriage to her house through the streets of the town, between the hours of 7 and 8 P. M.; that the carriage was being driven at an ordinary pace and in the middle of the road; that the night was dark and the carriage without lamps, but that the horse-keeper and coachman were shouting out to warn foot-passengers; that the defendant's carriage came into contact with the complainant's father, an old deaf man, and that complainant's father was thereupon knocked down, run over and killed.

The Session Judge referred the conviction as illegal on the ground that there was no evidence to show criminal negligence on the part of the defendant's coachman, and that even if such negligence on the part of the coachman were proved, the defendant could not be held criminally liable for the act of her servant.

The High Court are of opinion that if the facts made out in this case justified a conviction under Section 338 they must also have justified a conviction of culpable homicide. That Section deals with grievous hurt engendered by an act done so rashly and negligently as to endanger human life or the personal safety of others. The conscious doer of such an act, when death results from it, both before and after the new section is guilty of culpable homicide on the facts of a case such as this. The High Court are not at all prepared to say that only the immediate agent could be guilty. It is perfectly easy to conceive cases in which the master of the servant would be at least as much a principal as the Engineer in *R.* v. *Lowe* (3 C. & K. 123) and as the co-racing omnibus drivers in *Reg.* v. *Swindell and Osborne* (2 C. & K. 230). Looking at

the passive submissiveness of the native servant, it would be very dangerous doctrine indeed to hold the master inside entirely guiltless if his directions procured the rash and negligent act. 1871. August 17.

The High Court are not at all prepared, too, to say that the existence of contributory negligence would be a complete defence where in English law it would be so to an action. In *Hammack* v. *White*, 11 C. B. N. S., Willes, J. whose dictum (L. & C. 567-74) is a perturbing element in the English Criminal Law, distinctly says that the question is not the same in the Civil action and in an indictment for manslaughter (p. 598). What that learned Judge could have meant by saying that he should hold to his opinion that no person could be liable to a prosecution who could not be liable to an action, and that he should so hold until he saw a decision to the contrary, unless he meant a decision of the Court for Crown Cases Reserved, the Court are unable to say. He had the high authority of Maule, J. in *Reg.* v. *Haines* (2. C. & K. 368) that the contributory negligence of others is no defence and of Pollock, C. B. in *Swindell and Osborne's case* (2 C. & K. 230), of Rolfe, B. in *Reg.* v. *Longbottom* (Rus. C. and M. 871), that the law as to contributory negligence has generally no application. That doctrine of common law has received the most absurd extension (Compare *Thoroughgood* v. *Brian*, 8 C. B. 129, with *The Milan*, Lush. 388) and a very pertinent observation of Blackburn, J. (L. & C. 571) shows that if the question were the same, a man could not be convicted of murder for abetting suicide. These cases at common law on this point have really no bearing as matter of law. The conduct of the person injured will, of course, have important influence as matter of fact upon the relation of cause and effect between the act of the accused and the consequence induced.

In the present case the question for this Court is whether there was any evidence that the death of the deceased was induced by an act negligently and rashly directed by the accused.

That the driving was temperate and ordinary driving, there seems no doubt. That there was ample time for any person endowed with the fair exercise of his natural faculties to get out of the way seems also undoubted. The driver and passenger must necessarily assume that ordinary state of faculties. Then will the absence of lights supply that evidence of negligence and rashness? The Court are of opinion that it will not. That the absence of the candles was due to a violation of a distinct order of the accused

1871. August 17. is in her favour. That she directed careful driving when she discovered their absence rebuts any possibility of inferring that rash driving was due to her directions even if it existed, as it did not. On the ground, therefore, that there was no evidence which a Judge could properly leave to a jury that the death of the deceased was caused by any negligent or rash act of the accused, the High Court quash the conviction and sentence and direct that the fine levied be refunded.

Appellate Side.

Proceedings, 25th August 1871.

1871. August 25. UPON reading a letter from the Magistrate of the Godavery District, referring certain Proceedings of the Subordinate Magistrate of Alamur, as contrary to law.

The High Court made the following

There is no Act of the Legislature which empowers either the District Magistrate or the local Government to define a "town" for the purposes of Section 48, Act XXIV of 1859.

RULING :—In these cases the defendants were charged with committing certain offences *within the limits of a town* and were convicted and punished under the provisions of Section 48 of Act XXIV of 1859.

The High Court learn from the letter of the Magistrate that, in the year 1867, a notice was published by the Magistrate in the District Gazette to the effect that the provisions of Section 48 of Act XXIV of 1859 should be enforced in all the villages of the District, and that in April last a Notification was published by Government in the *Fort Saint George Gazette*, directing that the provisions of the Section should be enforced only in those places in which there was a Subordinate Magistrate's station and in the neighbouring villages not more than two miles distant.

The Magistrate was of opinion that the Government Notification annulled the authority of the Notification published by him in 1867, and that the convictions now referred having been made under the authority of the latter Notification were illegal.

The High Court are not aware of any Act of the Legislature which empowers either the Magistrate of the District or the local Government to define a "town" for the purposes of Section 48, Act XXIV of 1859.

It is scarcely necessary to point out that neither Section 4 of Madras Act X of 1865, nor the re-enactment of that Section contained in Section 5 of Madras Act III of 1871, can confer the authority, as the power of defining a "town" conferred upon the Local Government by those Sections is in each case expressly restricted by the words "for the purposes of this Act." 1871. *August* 25.

Holding this view the High Court are of opinion that the Notification issued by the Magistrate in 1867 and that issued by the Government in 1871 stand upon a precisely similar footing in being both alike devoid of legal authority. In the absence of any provision of Law defining a "town" the High Court are of opinion that it rested with the Magistrate to determine, on a reasonable consideration of the circumstances, whether or not the place was a town. The Magistrate is directed to report the facts upon which he has decided that the place in which the alleged offences were committed is a town, and authorized to take further evidence in proof of such facts.

Appellate Side.

Proceedings, 28th August 1871.

UPON reading a letter from the Acting Magistrate of Bellary, recommending an amendment of the Order of the High Court regulating the procedure to be followed by Magistrates in the submission of records to the Appellate Court. 1871. *August* 28.

The High Court made the following

The order of the High Court regulating the Procedure to be followed by Magistrates in the submission of records to the Appellate Court *amended* by substituting for the last part of it the words "When the order is made by a Sub-Magistrate, the copy submitted must be forwarded by the Magistrate of the Division, if any, appointed to hear appeals from such Sub-Magistrate, without more delay than is necessary for the purpose of revision to the Magistrate of the District, who will, after perusal, return the same to the Magistrate of the Division."

ORDER:—In the letter under consideration, the Acting Magistrate points out that the rule which requires a Sub-Magistrate to submit within 48 hours to the Magistrate of the District and to the Appellate Court to which the Sub-Magistrate is subordinate a copy of every order passed, together with a statement of the reasons for passing it, entails a great expenditure of time and labour on the limited establishment of a Sub-Magistrate's Court, and suggests that instead of a

1871. *August 28.* separate copy being forwarded to the District Magistrate, the copy submitted to the Magistrate in charge of the Division might be transmitted by the latter to the District Magistrate for perusal and return.

The High Court observe that the object of the rule will not be as effectually provided for by the amendment proposed. As, however, the observance of the rule appears to be attended with considerable inconvenience, the High Court are willing to sanction a change of practice, and to order that the rule be amended by substituting for the last part of it the words "When the "order is made by a Sub-Magistrate, the copy submitted must be "forwarded by the Magistrate of the Division, if any, appointed to "hear appeals from such Sub-Magistrate, without more delay than "is necessary for the purpose of revision to the Magistrate of the "District, who will, after perusal, return the same to the Magistrate "of the Division."

Appellate Side.

Proceedings, 3rd November 1871.

1871. *November 3.* UPON the question by the Civil Judge of Tanjore whether a Schedule appended to a deed of sale requires to be stamped under the provisions of Act XVIII of 1869 (General Stamp Act.);

The High Court made the following

A Schedule appended to a deed of sale does not require to be stamped under the provisions of Act XVIII of 1869.

RULING:—The High Court are of opinion that the Schedule is not a collateral instrument within the meaning of Clause 15 of Schedule II of the Act. Reference to it is necessary to the ascertainment of the object conveyed by the sale deed. As a Schedule it does not require a stamp, and if the stamp needed by the instrument is there, it is sufficiently stamped, unless there is any provision to the contrary in any rules framed under Section 5 of which the High Court are not aware.

Appellate Side.

Proceedings, 10*th November* 1871.

1871. *November 10.* UPON a reference by the Session Judge of Calicut of the Proceedings of the Deputy Magistrate of Malabar, Southern Division, in Case No. 114 of 1871,

The High Court made the following 1871. *November* 10.

RULING :—In this case the Deputy Magistrate has convicted the accused of mischief. The findings are that the defendants' cattle strayed on to the complainant's lands and caused damage, and that the defendants allowed the cattle to stray.

The mere fact of allowing cattle to stray, whereby damage is caused to the complainant, affords no evidence to support a conviction on the charge of mischief.

The High Court agree with the Session Judge that on these findings the conviction for mischief cannot be sustained. The mere fact of allowing cattle to stray affords no evidence of the offence. The convictions must be quashed and the fines levied refunded.

Appellate Side.

Proceedings, 13*th November* 1871.

UPON reading a letter from the District Magistrate of Salem, referring certain Proceedings of the Sub-Magistrate of Tripatúr, 1871. *November* 13.

The High Court made the following

RULING :—In this case the Sub-Magistrate convicted the accused of trespassing on the Railway Station at Vaniembady under Section 17 of Act XVIII of 1854, and sentenced him to pay a fine of 3 Rupees or in default to be imprisoned for five days.

Section 34 of Act XVIII of 1854 prescribes the mode in which fines levied under that Act are to be recovered. It is only on the return of the warrant of distress unsatisfied, or on the Magistrate being otherwise satisfied that no sufficient distress exists, that imprisonment can be imposed.

Section 34 of the Act quoted prescribes the mode in which fines are to be recovered by distress and sale. It is only on the return of the warrant of distress unsatisfied, or on the Magistrate being otherwise satisfied that no sufficient distress exists, that imprisonment can be imposed. It is possible that the Sub-Magistrate did so satisfy himself, and if so, he should have endorsed the fact upon his proceedings. The sentence as it stands is illegal and should be amended and a fresh Calendar submitted to the Appellate authority.

Appellate Side.

Proceedings, 13th November 1871.

1871. *November* 13.

UPON the question from the Acting Joint Magistrate of Salem, as to the power to carry out a sentence of flogging, the limit of 15 days from the date of sentence provided in Section 9 of Act VI of 1864 having expired,

The High Court made the following

A sentence of flogging cannot be carried out after the expiry of the limit of 15 days from date of sentence provided in Section 9 of Act VI of 1864.

RULING.—The Sub-Magistrate of Kristnaghiri appears to have erroneously entered in a warrant to the Superintendent of the Jail that the sentence of whipping passed on a prisoner was to be carried out at the expiry of the term of imprisonment, viz., six months, instead of at the expiry of 15 days from the date of sentence.

Section 9 of Act VI of 1864 attaches to every sentence of whipping passed by a Court whose sentence is open to revision a condition that the whipping shall not be inflicted before 15 days and shall be inflicted immediately on the expiry of 15 days.

Any direction to the contrary in a warrant addressed to the Superintendent of the Jail, such as appears to have been made in the present case, is therefore altogether void, and the warrant was on the face of it illegal and should have been returned to the Court issuing it for amendment. Thereupon a fresh warrant might have issued, as the sentence of whipping cannot, in the opinion of the High Court, be held to be absolutely bad in law. But, as the case now stands, the sentence otherwise legal has, by lapse of time been rendered inoperative, and the issuing of a legal warrant upon it to carry out the whipping has become impossible. The offender will therefore escape the whipping, but the validity of the sentence as to the imprisonment remains unaffected.

Appellate Side.

Proceedings, 17th November 1871.

1871. *November* 17.

UPON reading a letter from the Magistrate of North Arcot, submitting certain Proceedings of the Sheristadár and Sub-Magistrate of Wandewash Taluq connected with a case of theft,

The High Court made the following

RULING :—In this case the defendants were charged with theft, and on their appearance before the Sub-Magistrate on 1st May they were bound over by recognizance to appear from that date until the close of the trial. 1871. *November 17.*

Defendants were charged with theft, and on their appearance before the Sub-Magistrate on 1st May were bound over by recognizance to appear from that date until the close of the trial. On the 2nd May when the case was called on, defendants were not present, but they appeared on the 3rd. The Sub-Magistrate heard what they had to say and directed the penalties on the forfeited recognizances to be levied from the defendants. *Held*, that there was no ground for the interference of the High Court as a Court of Revision; that there was nothing illegal in requiring defendants to execute such a bond, and that no notice was necessary before proceeding to enforce the penalty.

On the 2nd May when the case was called on, the defendants were not present, but they appeared on the 3rd. The Sub-Magistrate heard what they had to say and directed the penalties on the forfeited recognizances to be levied from the defendants.

The Magistrate refers the Proceedings of the Sub-Magistrate as illegal, on the grounds that the bail bond taken from the defendants was unreasonable and informal, and that the defendants had not sufficient notice of the day on which they were required to attend.

The High Court are of opinion that there is no ground for their interference as a Court of Revision. The defendants bound themselves to appear from the date of the execution of the bail bond on every day until the case was disposed of. There was nothing illegal in requiring them to execute such a bond and no notice was necessary before proceeding to enforce the penalty. Whether the explanation of the defendants should or should not have been held a sufficient excuse for their default is not a question which it is open to the High Court to decide.

Appellate Side.

Proceedings, 18*th November* 1871.

UPON the question from the Civil Judge of Guntoor whether sale certificates under Section 259 of the Code of Civil Procedure are documents of which the registration is compulsory under Section 17 of Act VIII of 1871, or of which the registration is optional under Section 18, 1871. *November 18.*

The High Court made the following

1871. *November* 18.

Sale Certificates under Section 259 of the Civil Procedure Code are instruments declaring an interest in property, and if the value of the interest, so declared, be one hundred Rupees, or upwards, the registration of these instruments is compulsory under Section 17 of Act VIII of 1871.

RULING :—The High Court have considered the provisions of the Registration Act, and it appears to them as at present advised that Sale Certificates under Section 259 of the Civil Procedure Code are instruments declaring an interest in property; and that, if the value of the interest so declared is of one hundred Rupees or upwards, the registration of these instruments is compulsory under Section 17 of Act VIII of 1871.

The High Court are induced to depart in the present case from their usual practice of declining to give any opinion on questions which may come before them judicially for decision; as, adopting the view given above, the effect of non-registration would be most serious to all purchasers at Court sales.

In issuing Sale Certificates, the Courts will, in future, inform purchasers that unless the same are registered they will probably be held inadmissible as evidence of title.

Appellate Side.

Proceedings, 20th November 1871.

1871. *November* 20.

UPON the reference by the Magistrate of Coimbatore of certain Proceedings of the 2nd Class Sub-Magistrate of Anamallai as contrary to law,

The High Court made the following

Prisoners were sentenced to fines under Sections 21 and 22 of Madras Act III of 1864 and in default of payment of fine to rigorous imprisonment. *Held*, that as fine in these cases was the only assignable punishment, and, by Sections 30, 31 and 32 a specified procedure is laid down for the levy of the penalty, Section 64 of the Penal Code had no application.

RULING :—In these cases the prisoners were sentenced to fines under Sections 21 and 22 of Madras Act III of 1864, and in default of payment of fine to rigorous imprisonment.

Fine in these cases was the only assignable punishment, and, by Sections 30, 31 and 32, a specified procedure is laid down for the levy of the penalty. Section 64 of the Penal Code had, therefore, no application, and so much of the sentence as awards imprisonment in default of payment of fine is illegal and must be quashed.

Appellate Side.

Proceedings, 20th November 1871.

UPON reading certain Proceedings of the Session Court of Salem, 1871. *November* 20.

The High Court made the following

RULING :—A watchman on the Railway was placed before the Acting Head Assistant Magistrate charged with an offence under Section 26 of Act XVIII of 1854. That charge was dismissed on what the Session Judge considered frivolous grounds, and he ordered a fresh trial to be held.

A Railway watchman was charged before a Head Assistant Magistrate with an offence under Sec. 26 of Act XVIII of 1854. That charge was dismissed, but the Session Judge ordered a fresh trial. *Held*, that in so doing the Session Judge acted without jurisdiction.

In so doing the Session Judge has exceeded his authority. Section 435 of the Code of Criminal Procedure has no application, as the offence under the Railway Act is not one of those "specified in the 7th column of the Schedule," and was besides within the jurisdiction of any Magistrate by virtue of Madras Act III of 1865. (Vide Proceedings of High Court, dated 2nd April 1868[(a)]).

The order of the Session Court must be set aside as passed without jurisdiction.

Appellate Side.

Proceedings, 20th November 1871.

UPON reading a letter from the Session Judge of Tanjore, requesting that the order of commitment in Session case No. 39 of 1871 may be quashed as illegal, 1871. *November* 20.

The High Court made the following

RULING :—In this case the prosecution was instituted by the Judge of the Court of Small Causes at Combaconum, who sent the case for investigation to the Head Assistant Magistrate under the provisions of Section 171 of the Code of Criminal Procedure. The Head Assistant Magistrate transferred the case for investigation to the Sub-Magistrate of Combaconum, who committed the case to the Sessions for trial.

A Small Causes Court Judge sent a case for investigation to the Head Assistant Magistrate under the provisions of Sec 171 of the Criminal Procedure Code. The Head Assistant Magistrate transferred the case for investigation to the Sub-Magistrate, who committed the case to the Sessions. *Held*, that the order of commitment was bad.

Section 273 of the Code of Criminal Procedure is inapplicable to a case referred to a Magistrate under Sec. 171.

(a) See 4 M. H. C. R. App. ix.

1871. November 20.

In the Proceedings of the High Court, dated 10th November 1870, it was held that Section 273 of the Code of Criminal Procedure is inapplicable to a case referred to a Magistrate under Section 171. The order of commitment by the Sub-Magistrate in the present case is, therefore, bad and must be set aside, and the accused person discharged. But there is nothing to prevent the accused being again committed for trial after a formal preliminary enquiry by the Head Assistant Magistrate, through whose error the present illegality has arisen.

Appellate Side.

Proceedings, 27th November 1871.

1871. November 27.

UPON the question by the Civil and Session Judge of Vizagapatam, whether a Judicial Officer is by virtue of his office exempt from obligation to give evidence,

The High Court made the following

RULING:—The facts which gave rise to this reference are as follows:—

A Munsif ought not to be called on to depose as to what took place before him in the course of a trial which he was conducting as Munsif, and he is entitled to exemption.

The District Munsif of Vizagapatam gave sanction for a prosecution for giving false evidence in the course of a suit before him, and the Sub-Magistrate issued a summons to the District Munsif to appear and give evidence at the preliminary enquiry.

In the case reported at 3 M. H. C. R. 372, it was held that as to Magistrates who have acted judicially there is no exemption, but it was suggested that some Judges in the Mofussil could not properly be so compelled as to matters which have come before them judicially. This is unquestionably the opinion of the best writers and is assumed by that eminent lawyer Patteson, J. in *Regina* v. *Gazard* (8 C. & P. 595).

But the question is broadly put. Are Judicial Officers exempted from giving evidence? The answer is, of course, in the negative. They are not even exempted from giving evidence upon matters which they saw when sitting as Judges, unless they came to their knowledge by virtue of an investigation which they were making as Judges. Heath, J. gave evidence in the trial of *Earl of Thanet* v. *Fergusson* (27 St. Trials, 817). Another Judge gave evidence in the case of the regicides.

As to whether a Munsif should be called on to depose as to what took place before him in the course of a trial which he was conducting as Munsif, the High Court are of opinion that he should not and that he is entitled to exemption. He is at least as much so as a Chairman of Quarter Sessions. As to public policy, the result of permitting every indiscreet Magistrate to drag a Judge before him to depose as to what came before him judicially will be that many native Judges, at all events, will be deterred from doing their plain and obvious duty. 1871. *November* 27.

The High Court are, therefore, of opinion that if the Munsif's evidence in the present case was required as to matters which came before him judicially, the Magistrate was not entitled to exact it.

Appellate Side.

Proceedings, 27th November 1871.

UPON reading certain Proceedings of the Session Court of Cuddapah, reviewing (on appeal) the Proceedings in Calendar Case No. 41 of 1871 on the file of the Acting Head Assistant Magistrate of the District, and upon reading also the record of the above case, 1871. *November* 27.

The High Court made the following

An objection was taken before the Session Judge in the hearing of an appeal that the Head Assistant Magistrate had no jurisdiction to try the case, he having a distinct local jurisdiction which did not include the town where the offence was committed. It appeared that the Head Assistant Magistrate had received general instructions from the Magistrate of the District, as a temporary arrangement, to take up Criminal Cases arising within the limits of the said town, which was not within his division. *Held*, upon these facts, that the Head Assistant Magistrate had no jurisdiction.

RULING :—In this case an objection was taken before the Session Judge in the hearing of an appeal that the Head Assistant Magistrate had no jurisdiction to try the case, he having a distinct local jurisdiction which does not include the town of Cuddapah where the offence was committed. The reply to this objection was that the Head Assistant Magistrate had received general instructions from the Magistrate of the District as a temporary arrangement to take up criminal cases arising within the limits of the town. The Session Judge did not consider the objection valid.

1871. November 27. The High Court are of opinion that the facts as stated above disclose a defect of jurisdiction. In the Proceedings of 29th February 1864 it was held that a Divisional Magistrate, *i. e.* a Head Assistant Magistrate, is a Magistrate in charge of a division of a District, and it is not contended that the town of Cuddapah was within the Head Assistant Magistrate's division. Then, under Section 23 D of the Code of Criminal Procedure, the local Government and the local Government alone had power to alter the limits of such local jurisdiction. Under Section 36 it was open to the Magistrate to withdraw any particular case from any Court subordinate to him and refer it to another Court, but this would require an order of transfer in each case. Regulation IX of 1816, which is still unrepealed, confers no jurisdiction on a Magistrate of a District to extend a limited jurisdiction.

The result is that the Proceedings of the Head Assistant Magistrate in this case were without jurisdiction *ab initio*, and the conviction and sentence were bad in law. The whole proceedings both original and appeal must be quashed, and the prisoners discharged. It will, of course, be open to a Magistrate having jurisdiction to take up the case '*de novo*.'

Appellate Side.

Proceedings, 30th November 1871.

1871. November 30. UPON reading a letter from the Acting Magistrate of Cuddapah, referring certain Proceedings of the 1st Class Sub-Magistrate of Madanapalli,

The High Court made the following

A Sub-Magistrate convicted certain persons, under Sec. 174 of the Penal Code, of disobedience to summonses issued by him as Tahsildár. *Held*, that the convictions under the first part of Sec. 174, were sustainable. Madras Act III of 1869 gives a Tahsildár power to issue summonses.

RULING:—In this case the Sub-Magistrate convicted three persons, under Section 174 of the Penal Code, of disobedience to summonses issued by him as Tahsildár.

The reference is made by the Joint Magistrate because there is no evidence, and because the summonses were not to appear in a Court of Justice but before the Tahsildár, and the award of 20 days' imprisonment in default of payment of fine was illegal.

1871. *November* 30.

The Magistrate records his opinion that the convictions were altogether illegal, because the summonses were issued by the Tahsildár in his revenue capacity, and refers to a former ruling of this Court.

The High Court are of opinion that the convictions under the first part of Section 174 are sustainable. The summonses appear to have been in due form, and the defendants admitted their non-obedience. Madras Act III of 1869 gives a Tahsildár power to issue summonses. The ruling of the High Court referred to by the Magistrate was prior to the introduction of the special Act.

The summonses were to attend before a public servant. The sentence of 20 days' imprisonment in default of payment of fine is therefore illegal by virtue of Section 65 of the Penal Code. The maximum term of imprisonment that could be imposed in default of payment of fine was 7 days. That part of the sentence should now be amended.

Appellate Side.

Proceedings, 10*th November* 1871.

1871. *November* 10.

UPON reading a letter, dated 9th August 1871, from the Acting Agent of Vizagapatam, submitting for the orders of the High Court a question at issue between himself and the Assistant Agent.

The High Court made the following

RULING:—The facts which gave rise to this reference are as follows:—

A Police constable was tried and convicted by the Assistant Agent of Vizagapatam under Section 44 of Act XXIV of 1859, and sentenced to fine and imprisonment. On appeal, the Agent reversed the conviction and sentence on the ground that there had been irregularity of procedure on the part of his Assistant in not recording evidence for the prosecution, and in only taking down the substance of the prisoner's statement, and not the full statement as made. *Held*, that the question was whether there had been such error and irregularity on the part of the Assistant Agent as

A Police constable was tried and convicted by the Assistant Agent under Section 44 of Act XXIV of 1859 (Police Act), and sentenced to two months' rigorous imprisonment and 40 Rupees fine.

On appeal, the Agent reversed the conviction and sentence on the ground that there had been irregularity of procedure on the part of his Assistant in not recording evidence for the

1871. *November* 10.

to prejudice the accused and to occasion a failure of justice. That if not, the order reversing the conviction was rendered bad in law by Sections 426 and 439 of the Criminal Procedure Code. That the accused did not appear to have been prejudiced. Consequently, the order of the Appellate Court was set aside and a re-hearing directed.

prosecution, and in only taking down the substance of the prisoner's statement and not the full statement as made.

The Assistant Agent submitted that he had sufficiently complied with the provisions of the Code, and that the conviction ought not to have been reversed on this preliminary ground.

The real question for the solution of the High Court is whether there can be said to have been such error and irregularity of procedure on the part of the Assistant Agent as to prejudice the accused and to occasion a failure of justice. If not, Sections 426 and 439 of the Code of Criminal Procedure render the order of the Appellate Court reversing the conviction bad in law.

Both the Courts appear to have overlooked the instructions conveyed in the Proceedings of the High Court, dated 13th May 1867, in accordance with which the statement made by the prisoner should have been written down *in extenso* precisely as made. The omission to so record it does not, however, appear to have prejudiced the accused, as the substance of his statement was recorded and considered by the Assistant Agent, and in other respects the provisions of the Code appear to have been complied with substantially. The High Court must, therefore, hold that the Agent was wrong in disposing of the appeal without entering into the merits of the case, and his order must now be set aside, and he must be instructed to re-hear the appeal and, if necessary, to direct a further enquiry under Section 422 of the Code of Criminal Procedure as to the truth of the statements made in the appeal petition presented to his Court.

Appellate Side.

Proceedings, 20*th December* 1871.

1871. *December* 20.

UPON a reference by the Acting Session Judge of Nundial of the Proceedings of the Acting Head Assistant Magistrate of Karnúl in Case No. 49 of 1871, as contrary to law,

The High Court made the following

1871. *December* 20.

RULING :—In this case, the Head Assistant Magistrate convicted the accused of defamation under Section 500 of the Penal Code, and sentenced him to pay a fine of 30 rupees.

The Gumastah of a Guru or Priest was convicted of defamation for having published an order of his master excommunicating the complainant from his caste. The letter publishing the excommunication was a statement that complainant disobeyed some one and treated him with disrespect. *Held*, that the letter contained no expressions defamatory *per se*. If the person so treated was in a position entitling him to demand submission and to make non-submission an offence, then that position would render the communication privileged, and, if not, then the mere statement that the complainant did not obey one whom he was not bound to obey was not a defamatory imputation.

The defendant was the Gumastah of a Guru or Priest, and the offence consisted in publishing an order of his master excommunicating the complainant from his caste. The Sessions Judge is of opinion that the act of the defendant falls within the 1st or 9th exception of Section 499.

The High Court are of opinion that the letter which published the excommunication contains no expressions defamatory *per se*. It is a statement that he disobeyed some one and treated him with disrespect. If the person so treated was in a position entitling him to demand submission and to make non-submission an offence, then that position will render the communication privileged and, if not, then the mere statement that the complainant did not obey one whom he was not bound to obey is no imputation of a kind to amount to defamation. This species of religious oppression is melancholy and may be the matter of another remedy, but it is certainly not defamation. The conviction must be quashed, and the fine levied refunded.

Appellate Side.

Proceedings, 20th December 1871.

1871. *December* 20.

UPON reading certain proceedings of the Session Court of Madura, reviewing (on appeal) the Proceedings in Calendar Case No. 102 of 1871, on the file of the Acting Head Assistant Magistrate of Madura,

The High Court made the following

RULING :—The Session Judge observes "I find the rescue and "the offer of force are the constituent "parts of one continuous transac"tion, and consequently the convic"tion on both heads of the charge is "illegal." These observations as they

To enter up *findings* on every head of charge is not only not illegal but the most convenient course. Where the acts constituting the offence are founded on one single continuous transaction, *sentence* should only be passed for the principal offence.

1871. December 20.

stand are calculated to mislead. To enter up *findings* on every head of charge is not only not illegal, but has been held to be the most convenient course (Proceedings of 4th July, 1867). Where the acts constituting the offence are founded on one single continuous transaction, *sentence* should only be passed for the principal offence.

Appellate Side.

Proceedings, 21*st December* 1871.

1871. December 21.

UPON reading a letter from the Session Judge of Salem, referring the proceedings of the Assistant Magistrate of Salem in Cases Nos. 139, 140, and 141 of 1871, as contrary to law,

The High Court made the following

Certain Vaccinators were charged with furnishing false returns to their official superior. The Magistrate found as a fact that the returns furnished were false, but acquitted the defendants on the ground that they were not "legally bound" to furnish information within the meaning of Sec. 177 of the Penal Code. *Held*, that Sec. 177 embraces every case in which a subordinate may seek to impose false information upon his superior. The defendants in the present case were public servants, and part of the duties which they undertook was to make true returns to their official superior. To make false returns was therefore an offence.

RULING:—In this case certain Vaccinators were charged before the Assistant Magistrate with furnishing false returns to their official superior. The Assistant Magistrate found as a fact that the returns furnished were false, but acquitted the defendants on the ground that they were not "legally bound" to furnish information within the meaning of Section 177 of the Penal Code.

The question is whether Section 177 applies to a duty arising out of the contract of service. In the Proceedings of the High Court, dated 20th November 1862, it was held that the Section embraced every case in which a subordinate sought to impose false information upon his superior.

In the present case the defendants were public servants, and part of the duties which they undertook was to make true returns to their official superior. To make false returns was, therefore, an offence, and the judgments of acquittal passed by the Assistant Magistrate are erroneous in law. These acquittals must now be set aside and convictions entered up. The Assistant Magistrate will then proceed to pass sentences according to law.

Appellate Side.

Proceedings, 21st December 1871.

UPON a reference by the Session Judge of Calicut of certain Proceedings of the Acting Head Assistant Magistrate of Malabar as contrary to law, 1871. *December* 21.

The High Court made the following

Section 270 of the Code of Criminal Procedure applies only when a complaint of an offence, triable under Chap. XV of the Code, is dismissed.

RULING :—In this case seven persons were tried on a charge of Criminal trespass and acquitted. The Acting Head Assistant Magistrate at the same time awarded to the defendants the sum of 35 Rupees, as compensation, to be paid by the complainant, under Section 270 of the Code of Criminal Procedure. The Session Judge refers the order awarding compensation as illegal, on the ground that the complaint made was of House-trespass, an offence triable under the procedure of Chapter XIV, and that Section 270 of the Code of Criminal Procedure had no application.

Section 270 applies only when a complaint of an offence triable under Chapter XV is dismissed. It is clear that in this case the complaint was of an offence triable under Chapter XIV. The order awarding compensation must be quashed and the amount, if paid to the defendants, recovered from them and repaid to the complainant.

Appellate Side.

Proceedings, 29th December 1871.

UPON reading Proceedings of the Session Court of Bellary, reviewing certain proceedings of the Cantonment Magistrate of Bellary, 1871. *December* 29.

The High Court made the following

1871.
December 29.

Section 154 of Madras Act III of 1871 was not intended to apply to omissions to take out licenses. It applies to breaches of the Act which, in a Policeman's view are offences, and regarding which, if committed within his view, one of two courses is open to him, viz., to arrest without warrant, or to lay an information before a Magistrate and apply for a summons or warrant. If he adopts the latter course, then Secs. 43 and 66 of the Criminal Procedure Code require that the information should be reduced to writing and given on oath, or solemn affirmation, before any process is issued thereon. Sec. 68 of the Code is limited to cases in which no complaint has been made, and the Magistrate *proprio motu* institutes a prosecution.

RULING :—In Calendar Cases Nos. 424, 425, and 426 of 1871, verbal information was laid before the Cantonment Magistrate by a Police officer, under the instructions of the Municipal Commissioners, that certain Officers of the 60th Rifles had omitted to take out licenses for horses in their possession, as required by Section 67 of Madras Act III of 1871.

The Cantonment Magistrate thereupon issued summonses and convicted the defendants. On review of the Calendars in the above cases, the Session Judge observed,—" These " cases should have been initiated by " a sworn statement by some one on " the part of the prosecution. In the " absence of this, the Cantonment " Magistrate was not competent to issue his summons to the " defendants." To these observations the Cantonment Magistrate demurs and submits that, under the provisions of Section 154 of Madras Act III of 1871 and Section 68 of the Code of Criminal Procedure, his procedure was perfectly regular.

It appears to the High Court that Section 154 of Madras Act III of 1871 was not intended to apply to omissions to take out licenses. It applies to breaches of the Act which in a Policeman's view are offences, and regarding which, if committed within his view, one of two courses is open to him, viz., to arrest without warrant, or to lay an information before a Magistrate and apply for a summons or warrant. If he adopts the latter course, then Sections 43 and 66 of the Criminal Procedure Code require that the information should be reduced to writing and given on oath, or solemn affirmation, before any process is issued thereon. Section 68 of the Code of Criminal Procedure is limited to cases in which no complaint has been made, and the Magistrate *proprio motu* institutes a prosecution.

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Held, reversing the decree of the Lower Appellate Court, that an acknowledgment by the mortgagees of the mortgagor's title, sufficient to take the case out of the Statute, was evidenced by their written answer in Suit No. 238 of 1830, and by the answer in Original Suit No. 441 of 1861, as recited in the judgment in that suit, although the right to redeem and the amount of the mortgage were denied, and the acknowledgments were not made before those suits were brought................. 267

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Plaintiff, the Zamindární of Shivaganga, sued to recover

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two villages which she alleged formed part of the Shivaganga zamindárí. The villages originally belonged to Pitchama Náchiár, mother of the present defendant, Bothagurusámi Tévar, the ex-Zamindár of Shivaganga. In 1856, they were purchased by the Court of Wards on behalf of Bothagurusámi, who was then a minor, with part of the rents and profits of the zamindári, and in 1860 were given by him to his mother. In 1864, Bothagurusámi was ousted by a decree of the Privy Council and became liable to the present plaintiff for the mesne profits of the zamindárí. In the account taken of mesne profits due, the amount expended on the purchase of these villages was excluded by plaintiff's consent from the sum debited to the ex-Zamindár. Plaintiff now sued Pitchama Náchiár and she dying, the suit was continued against Bothagurusámi, as her representative. *Held*, that the plaintiff was not entitled to maintain the suit. The decree of the Privy Council did not directly give the plaintiff a right to maintain the suit, for the adjudication of the zamindárí related only to the permanently settled estate acquired under the Istimrári Sannad of the Madras Government; and even if it could be said to include the villages in dispute, process of execution would, under Section 11, Act XXIII of 1861, be the plaintiff's only remedy. There was but one ground upon which the suit could be supposed to lie, namely, the existence of the relation of trustee and beneficiary between the Collector and the plaintiff at the time of the purchase, and such relation did not exist......... 293

Suit brought to recover the amount to which plaintiff was entitled under a decree passed in favor of himself and defendant as co-plaintiffs in a former suit. It appeared that defendant purchased the property sold in execution of the decree and that the price for which the sale took place was sufficient to satisfy the decree. Instead of paying the purchase money into Court, defendant, with the knowledge and assent of plaintiff, retained the whole sum upon the understanding that he should give the Court a receipt for himself and on behalf of plaintiff, and afterwards pay to plaintiff his portion of the amount decreed. Accordingly, defendant presented a petition to that effect and obtained a certificate confirming the sale. Defendant having failed to pay plaintiff his portion, the present suit was brought. Upon these facts, it was *Held*, in Special Appeal, that the decree was satisfied by sale of the judgment-debtor's property and that the execution proceedings were completely at an end, the defendant having been, by the assent of the plain-

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tiff, made his agent for the acknowledgment of the satisfaction of the decree. No subsequent application under the decree could have been entertained by the Court which executed it. Therefore, plaintiff's claim was not a matter determinable under Sec. 11 of Act XXIII of 1861................ 304

Act XXIII of 1861, *Sec.* 35.

Petitioner bought at Court sale certain property which had been attached in O. S. No. 30 of 1860 on the file of the District Munsif's Court. Before, however, the sale certificate was issued to him, the plaintiff in O. S. No. 79 of 1866 presented a petition praying for a re-sale of the property on the ground that it had been sold at an undervalue. On this petition, the Munsif cancelled the former sale and ordered a re-sale. Before this re-sale took place, the property was sold in execution of the decree in Suit No. 3 of 1866 on the file of the Civil Court and purchased by the plaintiff in that suit. Thereupon, petitioner applied to the Munsif to re-sell the property in satisfaction of his claim. The Munsif refused to do so and the Civil Judge, upon appeal, confirmed the Munsif's order. *Held,* on Special Appeal, that the Munsif's first order annulling the sale, was a nullity, and the subsequent attachment and sale under the decree in O. S. No. 3 of 1866 inoperative against the property. That, consequently, the appellant was entitled to have these proceedings set aside and the validity of his sale upheld, if the respondent's objection that the orders were not open to question in the High Court should not prevail. Upon the latter point, *Held,* that no right of appeal existed, but that, therefore, the Civil Court had no jurisdiction to entertain the appeal to that Court, and, giving effect to the petition of special appeal as a petition under Section 35 of Act XXIII of 1861, that the orders of the Lower Courts should be annulled and the Petitioner declared entitled to an order and certificate perfecting his title... 360

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Prisoners were sentenced to fines under Sections 21 and 22 of Madras Act III of 1864, and in default of pay-

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ment of fine to rigorous imprisonment. *Held*, that as fine in these cases was the only assignable punishment, and, by Sections 30, 31 and 32, a specified procedure is laid down for the levy of the penalty; Section 64 of the Penal Code had no application.—(Rulings) xl

Act VI of 1864, *Sec.* 9.

A sentence of flogging cannot be carried out after the expiry of the limit of 15 days from date of sentence provided in Section 9 of Act VI of 1864.—(Rulings) xxxviii

Act XVI of 1864, *Sec.* 13.

A document creating and transferring a right of use of growing trees for a term of years is a document which purports to create or transfer an interest in immovable property within the meaning of Section 13 of the Registration Act of 1864; and, therefore, such document, if not registered, is inadmissible in evidence. 71

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Act VIII of 1865.—(*Madras.*)

Neither the Rent Recovery Act nor the Regulations operate to extend a tenancy beyond the period of its duration secured by the express or implied terms of the contract creating it....... 164

Neither Regulation XXX of 1802 nor Madras Act VIII of 1865 operate to make a tenancy, established by ordinary pattah and muchalka, of a permanent nature by attaching to it the condition that it should be indeterminable as long as the stipulated rent was paid... 175

Suit brought by plaintiff, as receiver of the Tanjore Rajah's property, in April 1869, for rent for Faslis 1272, 73, 74 and 75. At the first hearing, it was objected that the suit was barred, as to the claim for Faslis 1272-74, by Sec. 1, Clause 8 of the Limitation Act. Against this, it was urged that a suit had been pending for upwards of 2 years, and that time ought to be allowed under Section 14. The suit in question was brought in May 1866 by one Surfogi, who had assumed the management of the property, for the same cause of action against the present 1st defendant, and dismissed in November 1868, because the plaintiff had failed to produce any evidence. Before November 1868, the title asumed by Surfogi was set aside by the High Court, the present plaintiff was appointed and applied to the Court to make him a supplemental plaintiff, but his application was rejected. *Held*, [affirming the judgment of the Civil Judge that the claim was barred] that it was quite open to the present plaintiff at his election either to affirm or disaffirm Surfogi's contract, and that, having elected to affirm it, he should have been admitted into the former suit, but that in the present action he is in this dilemma.—Coming in

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as successor to Surfogí and suing upon the obligation created by his contract, the plaintiff is barred by *res judicata*. Coming in paramount to him, and upon a discordant title, Surfogí's proceedings were no interruption of the period of limitation, because then Surfogí is not the person through whom he claims.

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Act VIII of 1865.—(*Madras.*)

Sec. 11, *Rule* 3.

The provision in Madras Act VIII of 1865, Section 11, Rule 3,—" And when such usage is not clearly ascertainable, then according to the rates established or paid for neighbouring lands of similar description and quality"—does not admit of rates of rent being determined on an average of varying rates paid for neighbouring lands; but it does not require, for determination of the proper rate of rent for particular lands, the existence of a fixed general rate of rent for neighbouring lands of similar description and quality. The words " according to the rates established or paid" import clearly the power to determine the rate of rent in accordance with either the general rate at which neighbouring lands of a similar kind are let, or, where the rents of such lands vary, the rate at which rents had for any time been actually paid by some of the tenants of such lands.......................... 239

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Under the Summary Procedure in Bills of Exchange Act (V of 1866) the plaintiff is entitled to claim by his summons and obtain by his decree whatever sum, principal and interest, is, on the legal construction of the instrument, demandable... 257

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Act XXIV of 1867.

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widow (1st defendant) for recovery of the debt and, before judgment, obtained attachment and sale of property of the deceased, the sale proceeds being kept in deposit in the Court. These proceedings took place in June and July, and on the 15th August administration was granted to the Administrator General, the widow not having taken out administration. On the 28th September, the Administrator General was, on plaintiff's application, made defendant in place of the widow and the suit proceeded against him to decree. Before plaintiff applied to execute this decree, the amount of the sale proceeds was, by the direction of the Civil Judge, handed over to the Administrator General; accordingly, on this ground, plaintiff's application to the District Munsif for execution was rejected. He appealed unsuccessfully to the Civil Court. *Held*, on special appeal, that Section 33 of Act XXIV of 1867 took away plaintiff's right to payment otherwise than rateably with the other creditors....... 346

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ALIENATION.

Plaintiff sued, as managing trustee of a choultry, to set aside certain mortgages of the lands with which it was endowed, made by the 2nd, 3rd, and 4th defendants to the 6th and 7th defendants, and for an injunction to compel payment of kist, which had been allowed to fall into arrears, contrary to the provisions of Exhibit A, the muchalka sued upon. The defendants pleaded that the mortgages made were not in violation of the provisions of Exhibit A. The Court of First Instance dismissed the suit. On appeal, the Civil Judge considered the provisions in Exhibit A—" Moreover, we are only entitled to cultivate the said four villages and to maintain the said choultry with the income therefrom as above stated; and we have no right to alienate the said lands by sale, &c."—fatal to the right to mortgage advanced by defendants 1 to 5. Accordingly, he reversed the decree appealed from.

Held by SCOTLAND, C. J.—That the reasonable construction to be put upon that portion of the rázináma relating to alienation was that the villages were not to be alienated so as to deprive the choultry of the receipt of the portion of the produce fixed by the rázináma for its support. That the security of the cultivation of the land and the application of the fixed portion of the produce to the maintenance of the choultry was all that the parties intended to effect. That there was nothing in the record to show that the payment of that fixed portion had been rendered less certain by the transfer of the villages to the mortgagees. That, consequently, the beneficial interest of the plaintiff, as trustee under the rázináma, was not impaired, and the mortgages were not made in violation of the provisions of Exhibit A.

By HOLLOWAY, J.—That the right set up was based upon a purely capricious exercise of the plaintiff's will, in the effectuation of which he had no conceivable interest: that contractual words seeking to create a right of this sort are ineffective to create it, and that, consequently, the alienations by mortgage were wrongly declared void.................... 218

It is the firmly settled rule of Hindu Law, resting upon the authority of the *Mitáksharà* and repeated judicial decisions, that a managing co-parcener has not the capacity to alienate or charge the share of his minor coparcener in immovable ancestral property, except for the purpose of providing for some family need or the performance of an indispensable religious duty, or except the alienation or charge be for the benefit of the joint estate: and in every case to which the rule is applicable, the onus of

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showing, either by direct or presumptive proof, a *primâ facie* case in support of the existence of the condition necessary to give the legal capacity to make the disputed disposition, lies upon the party claiming to have acquired under it a title to the minor's share of the property. Upon the question of what is the amount of proof which the law renders necessary to discharge that burthen of proof.—*Held,* that where the dispute as to the validity of a sale or mortgage of family property is with the person to whom it was made, and the pecuniary consideration for it has not been advanced for the purpose of discharging an antecedent charge on the property or an old debt incurred by an ancestor; the case of the vendee or mortgagee, as regards the existence of a family need or sufficient beneficial purpose requiring the advance of the consideration money, must be established by positive proof. But that between a *bonâ fide* sale or mortgage for an advance made to pay off a pre-existing mortgage claim or an unsecured debt of an ancestor, and one not made for that purpose, there was this distinction to be observed, that the burthen of establishing by direct proof that such prior claim or debt was incurred for a proper family purpose is not cast upon the vendee or mortgagee. He is only required to show this presumptively. But to do so it is incumbent on him to give proof not only of the consideration for the sale or mortgage having been *bonâ fide* advanced in discharge of an antecedent debt, but also of an enquiry productive of results which warranted his reasonably believing that such debt was a family obligation and the sale or mortgage a prudent arrangement for its discharge............ 371

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The plaintiff brought a suit upon a specially registered bond under Section 53 of Act XX of 1866, to recover the whole amount secured by the bond. The bond contained a stipulation that the amount should be paid by three instalments, and that in default of payment of any one instalment the whole amount should become due immediately. Default was made by the obligor.

Held, that the summary remedy provided by Section 53 of Act XX of 1866 was not available to the plaintiff to recover the whole amount secured by the bond. A summary remedy, like that provided by Section 53, must be strictly applied.............................. 4

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A person who pledges what is pledged to him may be guilty of criminal breach of trust. There are two elements,—(1.) The disposal in violation of any direction of law or contract, express or implied, prescribing the mode in which the trust ought to be discharged. (2.) Such disposal dishonestly—(Rulings)...........................xxviii

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On the 3rd March 1870, the Madras Government issued a notification under Sections 4 and 5 of Madras Act IV of 1863, investing the Additional Principal Sadr Amín of Mangalore with exclusive jurisdiction to try Small Cause Suits for sums under Rupees 500 within the jurisdiction of the District Munsif. By order of the Civil Judge, the District Munsif sent to the Additional Principal Sadr Amín the records of all suits cognizable by a Court of Small Causes, if one had been in existence at the date of their institution, although they had been filed before the date of the notification, including the present application. *Held*, that the Additional Principal Sadr Amín had not jurisdiction to entertain the application. 18

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Sec. 148.

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The Court of First Instance refused to grant plaintiff's application to be allowed to examine 2nd defendant as a witness on her behalf, thinking the grounds of such application insufficient for the exercise of its discretion under Section 162 of the Civil Procedure Code. On the adjourned date of hearing, plaintiff failed to produce any other witness and the suit was dismissed under Section 148. On Regular Appeal, the Civil Judge considered that the Court of First Instance ought not to have refused plaintiff's application, but held that the refusal was a final order not open to question in appeal. On special appeal, *Held*, that the Civil Judge was wrong on the latter point. That if the plaintiff had been prevented from examining the 2nd defendant on insufficient grounds, she had not committed default under Section 148; that the decree on the finding of the Civil Court was not maintainable without enabling plaintiff to examine 2nd defendant, and that that finding was conclusive in the special appeal. The decrees of both the Lower Courts were consequently set aside, and the case remanded...... 299

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Sec. 240.

The plaintiff sued to recover certain land which had been hypothecated to him in 1843, and subsequently sold to him in 1868, while under attachment in execution of a decree in a suit brought by the plaintiff to establish his hypothecatory claim. The 3rd defendant claimed under a mortgage prior in date to the hypothecation to the plaintiff, and under a sale, prior in date to the sale to the plaintiff, made to the 3rd defendant whilst the land was under attachment in execution of the decree to the plaintiff.

Held, that the sale to the 3rd defendant, which was made not under any agreement with the plaintiff for the satisfaction of the decree through the Court, was invalid by reason of Section 240 of the Civil Procedure Code; but that the alienation to the plaintiff, the decree holder, during the attachment to satisfy the decree, which was duly sanctioned by the approval of the Court which issued the process of attachment, was valid...................... 65

Sec. 246.

Suit for redemption of an otti by an alleged purchaser of the same, and for recovery of land on which he had purchased a kánam. The defence was that the purchase was made by the father of the 1st defendant, and that the plaintiff was, constructively, a mere trus-

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tee. The Munsif decreed for the plaintiff, and the Principal Sadr Amín reversed his decree because the suit was not brought within a year of a release of the property from attachment under a claim of the defendants, which attachment was made in execution of two decrees for money against the present plaintiff. It appeared that in the proceedings had releasing the property from attachment no notice was issued to the judgment-debtor (present plaintiff). *Held*, that the decision of the Principal Sadr Amín was wrong. In the present case, the claimants in possession were not so according to any of the modes of derivation which Section 246 enumerates as authorizing the continuance of the possession and the dismissal of the claim. The possession was in the claimants, and there was nothing in the rights of the judgment-debtor which could make such possession his possession. This being so, even assuming that he was a party to the order made, such order could not be said to be against him; because his claim was one which could not have been determined by any order made under Section 246. The order so made was perfectly consistent with his present contention.......................... 416

Special Appeal No. 541 *of* 1868 (4 M. H. C. R. 472) distinguished.................. 416

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Section 270.

A, a judgment-creditor of the defendant, attached his property but took no further step. B, another judgment-creditor subsequently attached and sold the property. *Held*, that the decree holder who first attached the property of the judgment-debtor did not forfeit his prior right to payment under Section 270 of the Civil Procedure Code by delaying to obtain an order for the sale of the property upon his attachment.......... 348

Section 346.

A Special Appeal lies to the High Court from an order passed under Section 346 of the Civil Procedure Code dismissing the appellant's Regular Appeal for non-appearance of the appellant in person or by his pleader. *Devappa Setti* v. *Ramanadha Bhatt* (3 M. H. C. R. 109) commented on 1

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Although a Commissioner's Report should have very great weight attached to it, it is not absolutely binding. Vencata Reddi *v.* Venkatarámaiya, 1 *High Court Reports,* 418, dissented from... 36

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CONSTABLE.

See *Act XXIV of* 1859.—PROCEDURE.

CONSTRUCTION.

Suit to recover the proprietary right in a village belonging to plaintiff's muttah, which was let to defendant's father under a pattah and muchalka, and which, on the death of her father, and since, the defendant had refused to surrender upon the grounds,—(1) that the right had been leased permanently, subject to the regular payment of the stipulated rent, which condition had been strictly fulfilled; (2) that her father had expended large sums in making substantial permanent improvements in the village; and (3) that he had by gift transferred the tenancy to her.

Held, that on the true construction of the terms of the pattah and muchalka only a tenancy from fasli to fasli was created... 175

Muttukaruppa Gaundan v. *Ráma Pillai* (3 M. H. C. 158) applies to the defendant's admission of a transaction embodied in a written document not receivable in evidence, and is no authority whatever for construing a document present to the Court upon a defendant's admission ... 245

Plaintiff sued, as managing trustee of a choultry, to set aside certain mortgages of the lands with which it was endowed, made by the 2nd, 3rd and 4th defendants to the 6th and 7th defendants, and for an injunction to compel payment of kist, which had been allowed to fall into arrears, contrary to the provisions of Exhibit A, the muchalka sued upon. The defendants pleaded that the mortgages made were not in violation of the provisions of Exhibit A. The Court of First Instance dismissed the suit. On appeal, the Civil Judge considered the provisions in Exhibit A—"Moreover, we are only entitled to cultivate the said four villages and to maintain the said choultry with the income therefrom as above stated; and we have no right to alienate the said lands by sale, &c."—fatal to the right to mortgage advanced by defendants 1 to 5. Accordingly he reversed the decree appealed from.

Held, by SCOTLAND, C. J., that the reasonable construction to be put upon that portion of the rázináma relating to alienation was that the villages were not to be alienated so as to deprive the choultry of the receipt of the portion of the produce fixed by the rázináma for its support. That the security of the cultivation of the land and the application of the fixed portion of the produce to the maintenance of the choultry was all that the parties intended to effect. That there was nothing in the record to show that the

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payment of that fixed portion had been rendered less certain by the transfer of the villages to the mortgagees. That, consequently, the beneficial interest of the plaintiff, as trustee under the rázináma, was not impaired, and the mortgages were not made in violation of the provisions of Exhibit A.

By HOLLOWAY, J.—That the right set up was based upon a purely capricious exercise of the plaintiff's will, in the effectuation of which he had no conceivable interest: that contractual words seeking to create a right of this sort are ineffective to create it, and that, consequently, the alienations by mortgage were wrongly declared void. 248

The effect of the first and fourth clauses of Section 2 of the Indian Registration Act of 1871, read with the provision in the first Schedule as to the extent of the repeal of Act VII of 1870, is to keep in force all the provisions of Act XX of 1866 relating to the procedure for the recovery in a summary way of the amount of an obligation upon agreements recorded under Section 52 of that Act before the 1st day of July 1871... 351

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The exemption of the Government of India, dated the 19th September 1870, cannot be extended to copies of the statement of evidence and grounds of conviction. Persons desirous of obtaining copies of such documents for the purpose of appeal must furnish stamped paper on which the copies are to be written.—(Rulings)..................... xii

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Chapter XIV.

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The actual possession intended by Chapter XXII of the

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Code of Criminal Procedure does not include the occupancy of a mere trespasser.—(Rulings).......... xiii

Sec. 68.

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Sec. 163.

The defendant was convicted of contempt of Court under Section 163 of the Code of Criminal Procedure for having refused to sign a deposition given by him as a witness in the course of a revenue inquiry. The High Court set aside the conviction.—(Rulings)...... xiv

The Magistrate convicted the defendant of contempt of Court under Section 163 of the Code of Criminal Procedure and sentenced him to pay a fine of Rs. 10, or in default two days' imprisonment. *Held*, that the Magistrate had not exceeded his powers.—(Rulings.) xvi

Sec. 167.

The sanction of Government is required for the prosecution of any Judge if a complaint is made against him as Judge. Construction of Section 167 of the Criminal Procedure Code.—(Rulings) xxii

Sec. 169.

An application under Section 169 of the Criminal Procedure Code, praying for sanction to institute a prosecution on a charge of perjury, should, as a general rule, be first made to the Court before which the perjury is alleged to have been committed 92

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Sec. 170.

A Civil Court has no power to make an order, under Section 170 of the Criminal Procedure Code, sanctioning a prosecution for an offence committed before the Court of the Principal Sadr Amín on the Small Cause Side, that Court not being subordinate to the Civil Court........................... 191

Sec. 171.

When a Civil or Criminal Court sends a case for investigation to a Magistrate, under Sec. 171 of the Code of Criminal Procedure, the Magistrate to whom the case is sent must himself hold the investigation.—(Rulings)....................... ii

A Small Causes Court Judge sent a case for investigation to the Head Assistant Magistrate under the provisions of Sec. 171 of the Criminal Procedure Code. The Head Assistant Magistrate transferred the case for investigation to the Sub-Magistrate, who committed the case to the Sessions. *Held*, that the order of commitment was bad.—(Rulings) xli

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Sec. 270.

Section 270 of the Code of Criminal Procedure applies only when a complaint of an offence, triable under Chap. XV of the Code, is dismissed.—(Rulings)... xlix

Sec. 273.

Section 273 of the Code of Criminal Procedure is in-

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applicable to a case referred to a Magistrate under Sec. 171.(—Rulings)............. xli

Sec. 316.

The issue of a warrant under Sec. 316 of the Code of Criminal Procedure is permissible for every breach of an order of maintenance made under that Section, but there seems no ground for saying that a defendant can get out of his liability for any payment by the failure to issue a warrant for the levy of that payment. The result of issuing it for an aggregate of payments is that one month's imprisonment would alone be awardable in default.—(Rulings)... ...xxiii

Sec. 318.

A Magistrate, proceeding under Sec. 318 of the Code of Criminal Procedure, is bound to examine any witnesses tendered in support of the respective claims to actual possession of the land in dispute before passing an order.—(Rulings) iv

Sec. 380 *A*.

The Report of the Chemical Examiner to Government may be acted upon as evidence by all Criminal Courts by virtue of Section 380 A of the amended Code of Criminal Procedure.—(Rulings)........................ xi

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CRIMINAL TRESPASS.

Accused was Ejman of complainant's family. Complainant obtained a decree setting aside an alienation made by accused. In execution, complainant obtained possession from the alienee. The accused entered on this land. *Held*, that he had not committed the offence of criminal trespass.—(Rulings)........................ xix

Defendant was convicted of criminal trespass for having enclosed and commenced to cultivate a portion of a burial ground. *Held*, that the conviction was right. The person (corporate) in possession of the burial ground is the portion of the public entitled to use the burial ground and the act of ploughing up the burial ground was evidence of intent to annoy such person, the defendant not being one of the portion of the public entitled to its use.—(Rulings) xxv

Defendant was convicted of criminal trespass for including in his own land a portion of a public foot-path. *Held*, that as the public generally were entitled to the use of the foot-path, there was no illegal entry by the defendant on property in the possession of another with intent to annoy the person in possession, and consequently, that the defendant was wrongly convicted.—(Rulings)..... xxvi

CUSTOM.

See HUSBAND AND WIFE.

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DAMAGES.

Plaintiff and defendants, occupants of neighbouring houses, were joint tenants of the party-wall. Defendants unroofed their house, raised the roof and placed beams on it to re-build their house. The Lower Appellate Court found that, in consequence of this alteration, the rain from the defendants' house descended upon plaintiff's verandah and caused damage to plaintiff, and decreed that defendants should restore the wall to its former height, and remove the beams placed on it. *Held*, on Special Appeal, that taking the finding to be that the alteration created "stillicidium" where it did not exist before, or that it rendered more burdensome an existent "servitus stillicidii," it would be very dangerous to hold that every trifling excess in the exercise of a servitude should justify the pulling down of the building creating the excess: that in the present case the damages should be assessed and awarded, and the injunction to remove the roof of the house and reduce the wall be made conditional upon the defendant not removing the cause of the nuisance. In such a case the measure of damages is the amount which will induce the defendant to abate the nuisance...... 112

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DAUGHTER'S SON.

According to Hindu Law when the sons of daughters succeed to the property of their grandfather, they take by direct right of succession, as being his nearest heirs, like the sapindas of a man succeeding to his property on the death of his widow, but *per Capita.* The rule of succession exists as laid down in the Dáya Bhága, "a fortiori in the case of the daughter and grandson whose pretensions are inferior to the wife's"; and it rests upon the great principle of the entire Hindu Law of succession to property, that nearness in regard to the attributed capacity and sacred duty to confer spiritual benefits by the offering of funeral oblations, either immediately or mediately, confers the right to inherit temporal wealth.

Unmarried or married daughters, on whom as a class paternal property devolves, take a joint life interest with rights of survivorship. The estate of inheritance passes from their father to the sons of all the daughters as his nearest heirs; and on the death of the last surviving daughters the sons take the property equally........................ 311

DEAF AND DUMB PRISONER.

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DECLARATION OF TITLE.

See DECLARATORY SUIT.

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DECLARATORY SUIT.

Suit brought by plaintiff against the first three defendants as his tenants on kánam, and the 4th, the representative of a rival jenmi, to obtain a declaration of title as jenmi. Plaintiff had previously sued the first three defendants to establish the relation of jenmi and kánamkár and to recover the land. He failed and then brought the present suit.

Held, that this was a case of the employment of the device of a suit for a declaration of title in order to get back land by a crooked and not legal process after failure to recover by proper legal means. The intention being to cut off the defendants (the tenants) from the plea of res judicata. The Court which had a discretion as to whether such a suit should be permitted, ought at once to have said that it should not. Where there are no interests to be protected, there is no foundation for a suit for a declaratory decree.................. 117

Suits for a declaration of title to a divided share of ancestral property. The ground alleged in each case for seeking the declaration was that the representatives of the brothers of the plaintiff's father had refused to be parties to the registering of the property in plaintiff's name and had executed a deed of sale of it to a third party (3rd defendant) and registered him as the purchaser. The Court of First Instance, in each case, decreed for the plaintiff. The Appellae Cuourt, following the case reported at 2 M. H. C. R. 333, dismissed the suits on the ground that the plaintiffs were not in a position to maintain them. On Special Appeal *Held*, that the suits should be remanded for a declaration of the plaintiffs' title, if established. The principle upon which the decision reported at 2 M. H. C. R. 333 proceeds, is inapplicable to suits under Sec. 15 of the Civil Procedure Code............... 307

To maintain a suit for a declaration of title, some adverse act intended and calculated to be prejudicial to the title which the plaintiff seeks a declaration of, must appear to have been done by the defendant. The mere denial of the title, or doing an act which causes annoyance or cannot imperil the plaintiff's title, nor have any serious effect on the quiet enjoyment of his proprietary right, is not sufficient to support such a suit......... 307

The plaintiff, as the eldest surviving male representative of the Istimrár Zamindár of Shivaganga, sued for a declaratory decree establishing his right to succeed to the zamindári upon the death of the 1st defendant; and for maintenance. Plaintiff was the eldest surviving son of the only daughter of the Istimrár Zamindár by his senior wife. The 1st defendant, the Zamindární, was the youngest of his two daughters by his 3rd wife.

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He had also a daughter by his 2nd wife and another by his 6th wife. 1st defendant obtained possession of the zamindárí under an order of Her Majesty in Council which established the right of the daughters of the Istimrár Zamindár to succeed to the zamindárí on the death of his surviving widow Angamuttu, without prejudice to the rights of the 1st defendant and her sisters, *inter se*. When 1st defendant obtained possession she was the only survivor of the Zamindár's 5 daughters. The plaintiff's mother and the daughter by the 6th wife predeceased Angamuttu, and the daughter by the 2nd wife and the 1st defendant's uterine sister survived Angamuttu. Beside the plaintiff's mother the 1st defendant's uterine sister was the only one of the deceased daughters who had issue, and her only child, a son, died issueless some years before 1st defendant had established her right to the zamindárí. Before Angamuttu's death the 1st defendant was twice married and had issue, by her 1st husband the 3rd defendant, and by her 2nd husband the 2nd, 4th and 5th defendants. The Civil Court made the declaratory decree prayed for, but refused maintenance. The defendants appealed upon the grounds.—That the present was not a case for a declaratory decree. But, if it were, the decree should have declared either that the 1st defendant's son (2nd defendant) had the preferable right, or that the zamindárí was stridhanam property of the 1st defendant, and that, therefore, her daughters were her rightful successors. *Held*, that the plaintiff had a right to institute the suit. That the daughters of the 1st defendant were not her rightful successors to the Zamindárí and that the plaintiff was entitled to be, preferably to the 2nd defendant, declared reversionary heir to the zamindárí on the death of the 1st defendant............... 310

Plaintiff stating that he was obstructed in the cultivation of certain land which belonged to him, asked that the obstruction be removed and damages granted. The damages were disallowed; but the Civil Judge declared that plaintiff was entitled, basing that entitlement on the Statute of Limitations. *Held*, that where a man seeks a declaration of a title other than the possession which he has, mere possession for the period of the statute will not justify the declaration, which, allowing it to be made, ought to be based upon a finding of the title alleged by plaintiff, and not upon the existence of a possession for the period required by the statute to bar the action of another. Accordingly, the Lower Appellate Court was required to return a finding on the issue "whether the title asserted by plaintiff is proved."...... 420

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DECREE.

A plaintiff cannot recover more than is clearly given to him by the decree, either in express terms, or by necessary inference. Where the plaint prayed for interest up to the date of the suit, together with subsequent interest, and the decree purported to be an award in accordance with the prayer of the plaint. *Held*, that the plaintiff was not entitled to interest subsequent to the date of the decree.—(Rulings)...... i

See EXECUTION.

DEFAMATION.

The Gumastah of a Guru or Priest was convicted of defamation for having published an order of his master excommunicating the complainant from his caste. The letter publishing the excommunication was a statement that complainant disobeyed some one and treated him with disrespect. *Held*, that the letter contained no expressions defamatory *per se*. If the person so treated was in a position entitling him to demand submission and to make non-submission an offence, then that position would render the communication privileged, and, if not, then the mere statement that the complainant did not obey one whom he was not bound to obey was not a defamatory imputation.—(Rulings)... xlvii

DISOBEDIENCE OF LAWFUL ORDER.

The accused was convicted upon a charge that he, being summoned as a defendant in a case of trespass, left the Court without permission and thereby disobeyed the Summons. The Sub-Magistrate gave the accused a verbal order to appear when required, but did not adjourn the case to any particular day. *Held*, that the conviction was bad.—(Rulings)......... x

DIVORCE.

See MUHAMMADAN LAW.

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DOWER.

According to Muhammadan Law dower is presumed to be prompt in the absence of express contract, and may be euforced at any time... 9

EJECTMENT.

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EJMAN.

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ENDOWMENT.

Suit brought in 1868 to establish that plaintiff had vested in him the right to the office of karnam of certain villages, from which he had been ousted by the defendant in 1857, and to recover from defendant the mirási lands annexed to the office. The Court of First Instance decreed for plaintiff. The Civil Court reversed this decision on the ground that title to the office was the principal matter of the plaintiff's claim, and the right to pos-

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session of the land merely an incident dependent upon that title; that, therefore, as the period of limitation applicable to the former claim (6 years) had elapsed before the institution of the suit, it was not maintainable for the land. Upon Special Appeal, the decree of the Civil Court was affirmed, on the grounds that it was conclusively found that the land was inseparably attached to the office as a source of endowment for the services of the holder of it for the time being, and that, as against the plaintiff, the defendant was protected in the possession of the office by Clause 16, Sec. 1 of the Act of Limitations............ 301

EUROPEAN SOLDIER.

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EVIDENCE.

The prisoner pleaded that he was a British born subject, and therefore not amenable to the jurisdiction of the Session Judge of Tellicherry, by whom the prisoner had been convicted of Criminal misappropriation.

The evidence showed that the prisoner was the great grandson of John Turnbull, said to have been a sergeant in the service of the king, or of the East India Company, but was insufficient to establish a lawful marriage between him and a native Christian woman by whom he had a son, and the evidence as to his nationality was also incomplete. *Held*, that the plea to the jurisdiction was not made out... 7

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To establish the offence of giving false evidence direct proof of the falsity of the statement on which the perjury is assigned is essential. But, as legitimate evidence for this purpose, the law makes no distinction between the testimony of a witness directly falsifying such statement and the contradictory statement of the person charged, although not made on oath. Such a statement when satisfactorily proved is quite as good evidence in proof of the charge as the criminatory statement of a person charged with any other offence and on precisely the same ground.—That it is an admission of the accused person inconsistent with his innocence.

As to the weight to be given to contradictory statements, the sound rule is that a charge of perjury is not maintainable upon proof of one such statement not on oath, or more than one if proved by a single witness only, unless supported by confirmatory evidence tending to show the falsity of the statement in the charge.

With respect to the kind or amount of confirmatory proof required, it must be considered in each case whether the particular evidence offered is sufficient to induce a belief in the truth of the contradictory statement or direct testimony .. 342

The mere fact of allowing cattle to stray, whereby damage is caused to the complainant, affords no evi-

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dence to support a conviction on the charge of mischief.—(Rulings)...... xxxvii

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POLICE.

REGISTRATION.

RELEASE.

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EXECUTION.

In the execution of a decree for land passed prior to the enactment of the Code of Civil Procedure, in which the value of the produce of the land was given to the plaintiff up to the date of the decree, it is not competent to the Court executing the decree to grant further produce up to the date of execution............ 15

By the terms of a decree passed by the District Munsif, the plaintiff was declared entitled to the possession of certain land together with the crops upon it. The plaintiff asked for execution of the decree in respect of the land and the crops, which he alleged had been unlawfully taken away by the defendants, and possession of the land was given to the plaintiff, but he was referred to a separate suit for the damage sustained by him by reason of the removal of the crop. *Held*, that no separate suit could be maintained, but the plaintiff's remedy was by a proceeding in execution under Section 11 of Act XXIII of 1861.............. 13

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Plaintiff on the 15th June 1868, immediately after the death of his debtor, brought a suit against the debtor's widow (1st defendant) for recovery of the debt and, before judgment, obtained attachment and sale of property of the deceased, the sale proceeds being kept in deposit in the Court. These proceedings took place in June and July, and on the 15th August administration was granted to the Administrator General, the widow not having taken out administration. On the 28th September the Administrator General was, on plaintiff's application, made defendant in place of the widow and the suit proceeded against him to decree. Before plaintiff applied to execute this decree the amount of the sale proceeds was, by the direction of the Civil Judge, handed over to the Administrator General; accordingly, on this ground plaintiff's application to the District Munsif for execution was rejected. He appealed unsuccessfully to the Civil Court. *Held*, on special appeal, that Section 33 of Act XXIV of 1867 took away plaintiff's right to payment otherwise than rateably with the other creditors.......................... 346

FALSE EVIDENCE.

The making of any number of false statements in the same deposition is one aggregate case of giving false evidence. Charges of false

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evidence cannot be multiplied according to the number of false statements contained in the depositions.—(Rulings)........................ xxvii
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FLOGGING.

See *Act VI of* 1864, *Sec.* 9.—(Rulings)........................xxxviii

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GIFT.

Plaintiff sued to recover certain land in virtue of an alleged gift from her deceased husband. The parties were subject to the Marumakkattayam law. The facts were, that, the land being in the hands of tenants, a deed of gift with the counterpart lease was delivered by the donor to the plaintiff. It did not appear that there were any title-deeds belonging to the property. *Held,* reversing the decision of the Principal Sadr Amín, that the rule of law applicable is that a gift is perfectly valid if such delivery is made as the nature of the object permits, and that this had been done in the present case... 194

The Hindu law makes no distinction in favor of gifts in contemplation of death as respects the legal requisites to constitute a perfect disposition by gift. Those requisites are,—A giving, either orally or by writing, with the intention to pass the property in the thing given, accompanied by its actual delivery and acceptance in the donor's life-time. When all these requisites have been fulfilled, there is nothing in Hindu law to prevent effect being given to a gift in contemplation of death........................ 270

The theory of the *donatio mortis causâ* considered... 270

Plaintiff during his son's minority gave certain property to him and on the delivery of possession got from him a document stipulating, (1.) That he would not alienate. (2.) That at his death the property should return to the father. This document was deposited with the father and not heard of until the property was taken in execution for the son's debts many years after the gift. *Held,* that by Muhammadan Law as well as by the general principles of law, such a restriction on alienation, especially after the gift had become complete long before, is absolutely invalid............ 356

Plaintiff, the Nicka wife of the late Nawab of the Carnatic, sued for a declaration of her absolute title to certain premises (Nos. 1, 2, 3 and 4); for possession of certain other premises (Nos. 5 and 6); for delivery to her by defendant of the title deeds

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of all the premises except No. 1; and for cancellation and delivery up of a Sheriff's Bill of Sale of No. 1 in favor of T. A., of a mortgage of Nos. 2, 5 and 6 to R. and Co., of a mortgage of No. 4 to A. A.; and of all assignments by T. A., R. & Co., or A. A. to defendant. She claimed this relief under an alleged gift to her by the late Nawab on or about the 6th January 1851. Defendant said (and it was so found) as to Nos. 2, 5 and 6,—that he had never had anything to do with the said premises or with the title-deeds thereof. As to the other premises, that the several assignments in his possession were made to him as Receiver of the Carnatic property, under Act XXX of 1858, but that he had not obtained possession of the said premises nor of any of the title deeds thereof except the Sheriff's Bill of sale of the 29th November 1855. Issues were settled raising the following questions.—Whether the gift was made as alleged? Whether, if so, it was valid against creditors of or subsequent purchasers for valuable consideration from the donor? Whether the gift was revocable—and revoked? Whether defendant has or ever had possession of all or any of the title deeds of Nos. 2, 5 and 6? and lastly, whether plaintiff's claim was either wholly or in part barred by Act XIV of 1859. *Held*, that a complete gift had been made and not revoked. That it was valid against the creditors of the donor and also (as the donor and donee were both Muhammadans) against subsequent purchasers for valuable consideration from the donor. But that defendant had never had possession of the title deeds of Nos. 2, 5 and 6, so that the suit could not be maintained as regards them; and that it was barred, as to Nos. 1, 3 and 4, by Section I, Cl. 16 of Act XIV of 1859.

Under Muhammadan Law "in the instance of a wife who may give a house to her husband the gift will be good, although she continue to occupy it along with her husband and keep all her property therein, because the wife and her property are both in the legal possession of the husband. So also, it has been held by some that if a father transfer his house to his minor son, himself continuing to occupy it and to keep his property therein, the gift is valid; on the principle that the father in retaining possession is acting as agent for his son, according to which doctrine his possession is equivalent to that of his son." Reason requires that the same principle should be applied to the case of a gift by husband to wife. The wife may, according to Muhammadan Law, hold property independent of her husband, and as a husband may make a valid gift to his wife, it can only be

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necessary that the gift should be accompanied with such a change of possession as the subject is capable of and as is consistent with the continuance of the relation of husband and wife........................ 455

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See JURISDICTION.—(Rulings).xliii

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HIGH COURT ORDER.

Duplicates of Calendars sent by the Magistrate to the Session Court should be retained in the Session Court for a period of three years, after which they may be destroyed, or returned to the Magistrates' Offices.—(Rulings)........................ vi

Annulling Rule of Practice contained in the Proceedings of the late Sadr Court, dated 25th August 1823, relative to the Summoning of Public Officers and containing directions on the subject.—(Rulings)......... vi

HINDU FAMILY.

It is the firmly settled rule of Hindu Law, resting upon the authority of the *Mitákshará* and repeated judicial decisions, that a managing co-parcener has not the capacity to alienate or charge the share of his minor co-parcener in immovable ancestral property, except for the purpose of providing for some family need or the

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performance of an indispensable religious duty, or except the alienation or charge be for the benefit of the joint estate: and in every case to which the rule is applicable, the onus of showing either by direct or presumptive proof, a *primâ facie* case in support of the existence of the condition necessary to give the legal capacity to make the disputed disposition, lies upon the party claiming to have acquired under it a title to the minor's share of the property. Upon the question of what is the amount of proof which the law renders necessary to discharge that burthen of proof. *Held*, that where the dispute as to the validity of a sale or mortgage of family property is with the person to whom it was made, and the pecuniary consideration for it had not been advanced for the purpose of discharging an antecedent charge on the property, or an old debt incurred by an ancestor; the case of the vendee or mortgagee, as regards the existence of a family need or sufficient beneficial purpose requiring the advance of the consideration money, must be established by positive proof. But that between a *bonâ fide* sale or mortgage for an advance made to pay off a pre-existing mortgage claim or an unsecured debt of an ancestor, and one not made for that purpose, there was this distinction to be observed, that the burthen of estab-

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lishing by direct proof that such prior claim or debt was incurred for a proper family purpose is not cast upon the vendee or mortgagee. He is only required to show this presumptively. But to do so it is incumbent on him to give proof not only of the consideration for the sale or mortgage having been *bonâ fide* advanced in discharge of an antecedent debt, but also of an enquiry productive of results which warranted his reasonably believing that such debt was a family obligation and the sale or mortgage a prudent arrangement for its discharge.......................... 371

See *Act XX of* 1866, *Sec.* 17, *Cl.* 2........................... ix

HINDU LAW.

The Hindu law makes no distinction in favor of gifts in contemplation of death, as respects the legal requisites to constitute a perfect disposition by gift. Those requisites are,—A giving, either orally or by writing, with the intention to pass the property in the thing given, accompanied by its actual delivery and acceptance in the donor's lifetime.

When all these requisites have been fulfilled, there is nothing in Hindu law to prevent effect being given to a gift in contemplation of death......................... 270

According to the Hindu law of succession in force in the Madras Presidency, a sister's son is in the line of heirs 278

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Semble, he is a Bandhu...... 278

According to Hindu Law when the sons of daughters succeed to the property of their grandfather, they take by direct right of succession, as being his nearest heirs, like the sapindas of a man succeeding to his property on the death of his widow, but *per Capita.* The rule of succession exists as laid down in the Dáya Bhága, " a fortiori in the case of the daughter and grandson whose pretensions are inferior to the wife's ;" and it rests upon the great principle of the entire Hindu Law of succession to property, that nearness in regard to the attributed capacity and sacred duty to confer spiritual benefits by the offering of funeral oblations, either immediately or mediately, confers the right to inherit temporal wealth.................. 311

Unmarried or married daughters, on whom as a class paternal property devolves, take a joint life-interest with rights of survivorship. The estate of inheritance passes from their father to the sons of all the daughters as his nearest heirs ; and on the death of the last surviving daughters the sons take the property equally........................ 311

It is the firmly settled rule of Hindu law, resting upon the authority of the *Mitákshará* and repeated judicial decisions, that a managing co-parcener has not the capacity to alienate or charge the share of his

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minor co-parcener in immovable ancestral property, except for the purpose of providing for some family need or the performance of an indispensable religious duty, or except the alienation or charge be for the benefit of the joint estate: and in every case to which the rule is applicable, the onus of showing, either by direct or presumptive proof, a *primâ facie* case in support of the existence of the condition necessary to give the legal capacity to make the disputed disposition, lies upon the party claiming to have acquired under it a title to the minor's share of the property. Upon the question of what is the amount of proof which the law renders necessary to discharge that burthen of proof.—*Held*, that where the dispute as to the validity of a sale or mortgage of family property is with the person to whom it was made, and the pecuniary consideration for it had not been advanced for the purpose of discharging an antecedent charge on the property, or an old debt incurred by an ancestor; the case of the vendee or mortgagee, as regards the existence of a family need or sufficient beneficial purpose requiring the advance of the consideration money, must be established by positive proof. But that between a *bonâ fide* sale or mortgage for an advance made to pay off a pre-existing mortgage claim or an unsecured debt of an ancestor, and one not made for that purpose, there is this distinction to be observed; that the burthen of establishing by direct proof that such prior claim or debt was incurred for a proper family purpose is not cast upon the vendee or mortgagee. He is only required to show this presumptively. But to do so it is incumbent on him to give proof not only of the consideration for the sale or mortgage having been *bonâ fide* advanced in discharge of an antecedent debt, but also of an enquiry productive of results which warranted his reasonably believing that such debt was a family obligation and the sale, or mortgage, a prudent arrangement for its discharge.................. 371

See IMPARTIBLE PROPERTY.
WIDOW.
ZAMINDA'RI'.

HINDU PRIEST.

A Hindu Priest was charged with knowingly and wilfully solemnizing a marriage between two persons, one of whom professed the Christian religion, the said priest not being duly authorized under Section 6 of Act V of 1865, an offence punishable under Section 56 of the same Act. The Session Judge discharged the accused without trial on the ground that the enactment in question was inapplicable to the celebration of a marriage accord-

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ing to the Hindu form by a Hindu priest, though one of the contracting parties was a Christian convert. *Held*, that this view of the law was erroneous and that the accused was *primâ facie* liable under Section 56 of the Act.—(Rulings) xx

HUSBAND AND WIFE.

The plaintiff sued the defendant his wife and her father (1st and 2nd defendants) to recover damages for the non-performance of a contract, whereby the defendants agreed to deliver to the plaintiff a specified quantity of grain.

The plaintiff and the 1st defendant appeared before a punchâyat composed of members of their caste, and, the 1st defendant having refused to live any longer with the plaintiff, the punchâyat awarded the compensation claimed, and the defendants promised to deliver the grain. It was found that the award of the punchâyat was in accordance with the custom of the caste in cases in which the wife refused to live with the husband.

Held, that the plaintiff was enabled to maintain the suit........................... 40

IMPARTIBLE PROPERTY.

On the question of the extent to which property of the nature of an impartible Ráj is excepted from the general law by a special rule of succession entitling the eldest of the next of kin to take solely—*Held*, that such an usage does not interfere with the general rules of succession further than to vest the possession and enjoyment of the corpus of the whole estate in a single member of the family, subject to the legal incidents attached to it as the heritage of an undivided family. The unity of the family right to the heritage is not dissevered any more than by the succession of co-parceners to partible property; but the mode of its beneficial enjoyment is different. Instead of several members of the family holding the property in common, one takes it in its entirety, and the common law rights of the others, who would be co-parceners of partible property, are reduced to rights of survivorship to the possession of the whole, dependent upon the same contingency as the rights of survivorship of co-parceners *inter se* to the undivided share of each; and to a provision for maintenance in lieu of co-parcenery shares................. 93

The sound rule to lay down with respect to undivided or impartible ancestral property is, that all the members of the family who, in the way pointed out, are entitled to unity of possession and community of interest, according to the Law of Partition, are co-heirs, irrespectively of their degrees of agnate relationship to each other, and that, on the death of one of them leaving a widow and no near Sapindas in the male line, the family heritage,

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both partible and impartible, passes to the survivors or survivor, to the exclusion of the widow. But when her husband was the last survivor, the widow's position as heir, relatively to his other undivided kinsmen, is similar to her position with respect to his divided or self and separately acquired property............. 94

INTEREST.

Regulation XXXIV of 1802 having been repealed, a claim, in a suit between Hindus, for an amount of interest exceeding the principal sum due, is maintainable.......................... 400

A plaintiff cannot recover more than is clearly given to him by the decree, either in express terms, or by necessary inference. Where the plaint prayed for interest up to the date of the suit together with subsequent interest, and the decree purported to be an award in accordance with the prayer of the plaint. *Held*, that the plaintiff was not entitled to interest subsequent to the date of the decree.—(Rulings)...... i

See *Act V of* 1866.

RENT.

"IN THE MEANTIME."

The words "in the meantime" in Clause 15, Sec. 1 of the Limitation Act, import the time between the creation of the relation of mortgagor and mortgagee in possession and the end of the period of limitation...... 138

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JOINT MAGISTRATE.

See JURISDICTION............... iii

JUDGE.

The sanction of Government is required for the prosecution of any Judge if a complaint is made against him as Judge—(Rulings)......... xxii

JUDGE'S CHARGE.

In the trial of prisoners for the offence of belonging to a gang of persons associated for the purpose of habitually committing theft or robbery (Sec. 401, Penal Code), the Judge should, in his charge, put clearly to the jury—

1. The necessity of proof of association.
2. The need of proving that that association was for the purpose of habitual theft, and that habit is to be proved by an aggregate of acts... 120

JURISDICTION.

The prisoner pleaded that he was a British born subject and therefore not amenable to the jurisdiction of the Session Judge of Tellicherry, by whom the prisoner had been convicted of criminal misappropriation.

The evidence showed that the prisoner was the great grandson of John Turnbull, said to have been a Serjeant in the service of the King or of the East India Company, but was insufficient to establish a lawful marriage between him and a native Christian woman by whom he had a son, and the evidence as to his nationality was also incomplete. *Held*, that the plea to the jurisdiction was not made out................. 7

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An application was made on the 14th March 1870 to the District Munsif to set aside a decree passed ex-parte against the defendants under Section 119 of the Code of Civil Procedure.

On the 3rd March 1870 the Madras Government issued a Notification under Sections 4 and 5 of Madras Act IV of 1863, investing the Additional Principal Sadr Amín of Mangalore with exclusive jurisdiction to try Small Cause Suits for sums under Rupees 500 within the jurisdiction of the District Munsif. By order of the Civil Judge the District Munsif sent to the Additional Principal Sadr Amín the records of all suits cognizable by a Court of Small Causes if one had been in existence at the date of their institution, although they had been filed before the date of the Notification, including the present application. *Held*, that the Additional Principal Sadr Amín had not jurisdiction to entertain the application ... 18

In execution of a decree the District Munsif made an order which he was not legally authorized to make at the instance of the purchaser of the property sold in execution. No appeal could be made against the order, but the Civil Judge entertained an appeal and reversed the order of the District Munsif. The High Court set aside the order of the Civil Judge under Section 35, Act XXIII of 1861, but, by virtue of the powers given by the Section, the order of the District Munsif was also annulled... 22

The plaintiffs sued the defendants in the Small Cause Court to recover the value of certain nets, the property of the plaintiffs, of which the defendants had taken wrongful possession, and damages for the loss sustained by the plaintiffs in that they were unable to carry on their business as fishermen by reason of the detention of their nets by the defendants.

Held, that the Small Cause Court had jurisdiction to entertain the suit............... 34

A Civil Court has jurisdiction to determine a suit where the defendants dwell, or the cause of action arises within the jurisdiction of the Court ... 43

The plaintiff sued to establish his right to and to recover certain lands in the possession of which he had been obstructed by the defendants. The plaintiff purchased the lands at a sale held in execution of a decree obtained against the 1st and 2nd defendants in the Court of the District Munsif of Tripassore. The sale was directed by the District Munsif of Tripassore. Between the date of the decree and the sale, the village in which the lands were situated was transferred from the jurisdiction of the District Munsif of Tripassore to the District Munsif of Conjeveram.

Held, that the sale was a nullity and conferred no title upon the plaintiff: but that he was entitled to recover from the first and 2nd defend-

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ants the amount of the purchase money paid by him. 58
The valuation of the matters of litigation for the purpose of determining the jurisdiction of Múnsifs is to be made in the mode prescribed by Sec. 11, Regulation VI of 1816 and Regulation III of 1833 and not in that prescribed in the Stamp Acts. 151
A Civil Court has no power to make an order, under Section 170 of the Criminal Procedure Code, sanctioning a prosecution for an offence committed before the Court of the Principal Sadr Amín on the Small Cause Side, that Court not being subordinate to the Civil Court. 191
An action lies in a Small Causes Court for the recovery of costs incurred by the plaintiff in a suit to compel registration of a document... 192
The plaintiffs, members of the Tengalai sect of Brahmins, sued the defendants, the trustees of a temple at Conjeveram, for the recovery of the money value of certain holy cakes which they alleged they were entitled to receive from the defendants for commencing the recital of a Sanscrit verse and reading a certain Tamil chant, which offices they (plaintiffs) had the hereditary right of performing in the said temple. The Munsif decreed in favor of some of the plaintiffs. The defendants appealed. The Civil Judge dismissed the suit on the ground that the question incidentally involved was one of a religious character. *Held*, that the Civil Judge was wrong; that the claim was for a specific pecuniary benefit to which plaintiffs declared themselves entitled on condition of reciting certain hymns; and that, undoubtedly, the right to such benefits is a question which the Courts are bound to entertain...................... 449
The prisoner was convicted under Sec. 475 of the Penal Code, and, having been previously convicted of an offence punishable under Cap. XVII of the Code, the Magistrate sentenced him to four years' rigorous imprisonment. *Held*, that the Magistrate had power to pass sentence of two years' imprisonment only.—(Rulings)...................... ii
The Joint Magistrate of Tellicherry has no jurisdiction to try a resident of Mysore for Criminal acts done in Mysore.—(Rulings) iii
A Magistrate has no jurisdiction to order a sum of money deposited under Section 228 of the Code of Criminal Procedure, for the refund of which an application was made, to be credited to Government.—(Rulings)... ... ix
A Railway watchman was charged before a Head Assistant Magistrate with having committed an offence under Section 26 of Act XVIII of 1854. That charge was dismissed, but the Session Judge ordered a fresh trial. *Held*, that in so doing the Session Judge acted without jurisdiction.—(Rulings)....................... xli

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An objection was taken before the Session Judge in the hearing of an appeal that the Head Assistant Magistrate had no jurisdiction to try the case, he having a distinct local jurisdiction which did not include the town where the offence was committed. It appeared that the Head Assistant Magistrate had received general instructions from the Magistrate of the District, as a temporary arrangement, to take up criminal cases arising within the limits of the said town, which was not within his division. *Held*, upon these facts, that the Head Assistant Magistrate had no jurisdiction.—(Rulings) ... xliii

See *Act XXIII of* 1861, *Sec.* 35.

MAGISTRATE,

RE-SALE.

KA'NAM.

Third defendant, purchaser of the interest of 1st and 2nd defendants, held certain lands under the terms of a permanent kánam which contained the following condition :—" And (I have also agreed) that on failure to pay the said quantity of paddy the kánam amount of 550 fanams shall be received by me, and the land restored." In a suit by the kánamdár to recover possession for non-payment of rent: *Held*, that this condition of redemption was intended as a penalty to secure regular payment of the rent, and that, such being the original intention of the parties, the penalty was one which ought to be relieved against...... 258

KARNAM.

See LIMITATION ACT.............. 301

KARNAVAN.

Suits by a branch Karnavan of a Malabar tarwád to recover certain lands belonging to his branch tarwád which had been mortgaged by a former branch Karnavan. Plea, that the plaintiff had no right to sue without the authority of the senior member of the family, the Vélia Kaimál. Upon an issue sent by the High Court it was found by the Civil Judge that there was no binding and peculiar custom in the family depriving the senior member of all management of the property and vesting it in the branch Karnavans. Upon the final hearing it was contended that the contrary had been so irrevocably fixed by judicial decision as to prevent the matter from being open to question, and that this finding was bad in law, as being opposed to binding decrees of competent Courts. *Held*, by HOLLOWAY, J.—(1) That there was nothing compelling the Court to decide, contrary to the plain rules of law, that this delegation was irrevocable; that, perhaps, it was not so even by the delegator, and still less was it so by his successors. (2.) That the fact of the setting apart of stánam property, if it was set

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apart, can make no difference, and as little can the circumstance of the income reserved. (3.) That there was nothing to prevent the Court from deciding that the Civil Judge was right in saying that this was an ordinary Malabar tarwád. (4.) That the renunciation before the Sadr Court was not even irrevocable as against him who made it, and certainly could not have the effect of depriving the senior member, for all future time, of the rights which the law of the country conferred upon him with the correlative duties upon his becoming senior.

By SCOTLAND, C. J.—That the Court was not constrained to hold that the irrevocability of the arrangement effected in 966 by the former head of the family, as to the apportionment of the family property between two Taverais and the management of each Taverai's allotment by its senior member, was a matter conclusively adjudicated in the course of the litigation of which there was proof in the records. That such arrangement operated only as a personal renunciation and delegation of the rights of management possessed by the then Head of the tarwád; and that assuming it to have been irrevocable by him, it was not binding on the 3rd defendant, admittedly the head of the family by right of seniority. 401

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LANDLORD AND TENANT.

See TENANCY.

LANDS ATTACHED TO AN OFFICE.

See ENDOWMENT...... 301

LEASE.

Suit to eject defendants (who held under a lease, Exhibit A.) from a house-ground and to compel them to remove the buildings thereon erected. The defendants pleaded that A. was a permanent lease and that plaintiff had no right to eject. The lease, A, expressly authorized the lessee to build. The Court of First Instance, holding that A. was not a permanent lease, decreed as sued for. The Appellate Court, while concurring with the Munsif as to the construction of A., gave to the plaintiff the option of paying for the house and resuming the land, or of receiving the value of the land from the defendant. *Held*, that the decree of the Principal Sadr Amin was right.

Muttukaruppa Kaundan v. *Ráma Pillai*, 3 M. H. C. 158, applies to the defendant's admission of a transaction embodied in a written document not receivable in evidence, and is no authority whatever for construing a document present to the Court upon a defendant's admission......... 245

LIMITATION ACT.

The period during which a suit is pending in a Court not having jurisdiction is to be excluded from the period of limitation provid-

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ed by Act XIV of 1859, and the fact that the second suit, in bar of which the Act is pleaded, was instituted before the Court not having jurisdiction disposed of the first suit, is immaterial........................ 45

In a suit by the plaintiff to recover money lent more than three years before suit, the plaintiff alleged an express verbal promise by the debtor to pay the amount sued for made upon a settlement of accounts.

Held, by HOLLOWAY and KINDERSLEY, J. J.—That a verbal promise was not sufficient to prevent the application of the Act of Limitation.

Per KINDERSLEY, J.—If the debtor and creditor enter into a new contract, the debtor promising to pay a barred debt, that would seem to be a new cause of action, and it is doubtful whether it was the intention of the Limitation Act to insist that the new promise should be in writing... 51

To render an arrangement, come to orally for the payment of the balance of an antecedent debt on a settlement of accounts, available in support of a suit brought after the expiration of the period of limitation applicable to such debt, it must be clearly shown to have amounted to a new valid contract to pay the balance, which extinguished the original cause of action........................... 197

Suit by executrix to recover under deeds of mortgage and sale, dated respectively October 1837 and April 1840, executed to the testator by 1st defendant's deceased husband, certain villages which 1st defendant, in 1848 and 1851, mortgaged to 2nd and 3rd defendants. Plea, the Act of Limitations. For the plaintiff it was contended that the operation of the Limitation Act was suspended from 1844 until 1867, by reason of the pendency of an Equity Suit, commenced by bill filed by present 1st defendant against the testator, to set aside the deeds of October 1837 and April 1840, which bill was dismissed by consent in June 1867. *Held*, (reversing the decision of the Lower Court) that these proceedings had no such effect, that plaintiff might have brought ejectment at any time and that the present suit was barred. 234

Plaintiff stating that he was obstructed in the cultivation of certain land which belonged to him, asked that the obstruction be removed and damages granted. The damages were disallowed; but the Civil Judge declared that plaintiff was entitled, basing that entitlement on the Statute of Limitations. *Held*, that where a man seeks a declaration of a title other than the possession which he has, mere possession for the period of the statute will not justify the declaration, which, allowing it to be made, ought to be passed upon a finding of the title

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alleged by plaintiff, and not upon the existence of a possession for the period required by the statute to bar the action of another. Accordingly, the Lower Appellate Court was required to return a finding on the issue "whether the title asserted by plaintiff is proved."..................... 420

The 1st plaintiff claimed to redeem a mortgage to defendants' ancestor for Rupees 320. Defendants pleaded that the mortgage was for Rupees 2,336-4-0, and redeemable only at the pleasure of the mortgagee. They also pleaded the Limitation Act. The Original Court decreed redemption on payment of the amount stated by defendants. The Lower Appellate Court reversed that decree and dismissed the suit as barred.

Held, reversing the decree of the Lower Appellate Court, that an acknowledgment by the mortgagees of the mortgagor's title sufficient to take the case out of the Statute was evidenced by their written answer in Suit No. 238 of 1830, and by the answer in Original Suit No. 441 of 1861, as recited in the judgment in that suit, although the right to redeem and the amount of the mortgage were denied, and the acknowledgments were not made before those suits were brought.................. 267

The Act for the limitation of suits does not require that the acknowledgment of the title of a mortgagor should be made to any particular person, or at any particular time before the institution of the suit in which the bar is pleaded... 267

See *Act XIV of* 1859.

CAUSE OF ACTION.

LIS PENDENS.

Suit to recover possession of a Mutah from which plaintiff had been ejected by an order of Court, passed in execution of the decree in a suit to which he was no party. Plaintiff claimed under a deed of sale from A., (a purchaser from C. and D.) dated 11th November 1860, and alleged that he purchased for valuable consideration and without notice of any other claim. Defendant asserted that plaintiff purchased fraudulently with notice of her late husband's right of purchase. It appeared that defendant's husband had sued C., D. and others to enforce a lien upon the Mutah and obtained a judgment of the Privy Council upholding his lien and declaring its priority over the purchases of C. and D. This suit was pending before the Privy Council at date of plaintiff's purchase. In 1862 defendant's husband sued C. and D. for specific performance of an alleged agreement for sale, dated October 1851, and got a decree in his favor. The present plaintiff was turned out of possession under this decree, to the proceed-

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ings in which he had in vain sought to get made a party, on the ground that he was affected by notice of the former proceedings. He sought relief under Section 230, Act VIII of 1859, but his application was dismissed and he then commenced this suit. The Civil Judge decided in favor of plaintiff:—*Held*, confirming the decree of the Lower Court, that this was a case of a vendee of property, perhaps subject to a lien, turned out upon a decree against other people declaring the holder of the lien the owner of the property, and that the ejectment was wrongful and procured by a gross misuse of the Court's process.

The effect of notice of a *lis pendens* considered... 75

Suit by executrix to recover under deeds of mortgage and sale, dated respectively October 1837 and April 1840, executed to the testator by 1st defendant's deceased husband, certain villages which 1st defendant, in 1848 and 1851, mortgaged to 2nd and 3rd defendants. Plea, the Act of Limitations. For the plaintiff it was contended that the operation of the Limitation Act was suspended from 1844 until 1867, by reason of the pendency of an Equity Suit, commenced by bill filed by present 1st defendant against the testator, to set aside the deeds of October 1837 and April 1840, which bill was dismissed by consent in June 1867. *Held*, (reversing the decision of the Lower Court) that these proceedings had no such effect, that plaintiff might have brought ejectment at any time and that the present suit was barred......... 234

MAGISTRATE.

Suit to recover damages from defendant, Deputy Magistrate of the zillah of Trichinopoly, for a trespass alleged to have been committed in execution of an order made by him under Section 311 of the Criminal Procedure Code, directing the demolition of the plaintiff's house as being a nuisance to a public thoroughfare. Defendant denied his liability, alleging in justification of his order that he believed the house to be obstructive to public comfort and proceeded in accordance with Sections 308, 310, and 311 of the Criminal Procedure Code, and that, having acted in good faith in discharge of his duties as a Magistrate, he was protected by Act XVIII of 1850. The issues settled were (1) whether the house was an obstruction and nuisance within Section 308 of the Criminal Procedure Code: (2) whether the defendant acted in good faith in the discharge of his public duty in ordering the removal of the house: (3) whether the plaintiff was entitled to the amount of damages claimed. The Civil Judge held, upon the 1st issue, that the defendant had no jurisdiction to order the removal of the

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house : upon the 2nd issue, that defendant had not acted with due care and attention, but from feelings of personal animosity towards plaintiff, and was, therefore, not protected by Act XVIII of 1850. Upon the 3rd issue, he assessed the damages at Rupees 500. The defendant appealed relying mainly upon the objection that no action lay against him inasmuch as, first, it had not been shown that he acted without jurisdiction in making the order complained of; and secondly, that even if he had acted without jurisdiction, he acted believing at the time in good faith that he had jurisdiction, and was, therefore, entitled to the protection given by Act XVIII of 1850. *Held*, upon the first point, that an entire absence of jurisdiction to make the order had been shown. Upon the second point, that the facts of the case furnished no reasonable or probable ground for belief in the existence of jurisdiction by a Magistrate of ordinary qualifications : that the defendant must, therefore, be held not to have entertained that belief in good faith, unless the provisions of the Criminal Procedure Code, under which he acted, admit of the view that he might, not unreasonably, think that it was probably intended to apply to such an annoyance as that complained of. That, however, these provisions were open to such a misunderstanding and misapplication by a Magistrate of ordinary qualifications, and consequently that the suit should be dismissed... 423

When a Civil or Criminal Court sends a case for investigation to a Magistrate under Sec. 171 of the Code of Criminal Procedure, the Magistrate to whom the case is sent must himself hold the investigation.—(Rulings)...... ii

A Magistrate, proceeding under Sec. 318 of the Code of Criminal Procedure, is bound to examine any witnesses tendered in support of the respective claims to actual possession of the land in dispute before passing an order.—(Rulings) iv

In cases triable under Chap. XIV of the Criminal Procedure Code, where a magistrate, on account of the non-appearance of the complainant, or for any other sufficient cause, is satisfied that the charge cannot be substantiated, he may dismiss the complaint. The dismissal will not bar the complaint being again entertained—(Rulings)............ viii

In disposing of an appeal the Magistrate at first reversed the Sub-Magistrate's decision and directed the release of the appellant ; subsequently he recalled this order and confirmed the Sub-Magistrate's decision. *Held*, that the second order of the Magistrate ought to be set aside, and the origin-

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al order restored.—(Rulings)........................ viii

A Magistrate has no jurisdiction to order a sum of money deposited under Section 228 of the Code of Criminal Procedure, for the refund of which an application was made, to be credited to Government.—(Rulings)... ix

Sanction was given by the Magistrate for the institution of Criminal proceedings against the defendant for having made a false charge against the complainant. The Magistrate dismissed the complaint on the ground that the complainant had taken no step to prosecute for three months after the sanction was obtained. *Held*, that the Magistrate had power to dismiss the complaint.—(Rulings)... xv

The Magistrate convicted the defendant of contempt of Court under Section 163 of the Code of Criminal Procedure and sentenced him to pay a fine of Rupees 10, or in default, two days' imprisonment. *Held*, that the Magistrate had not exceeded his powers.—(Rulings)... xvi

A commitment by a Subordinate Magistrate to the Session Court with respect to offences not exclusively triable by the Session Court is good.—(Rulings)......... xvii

A Magistrate is not authorized to alter his finding once recorded.—(Rulings)... xviii

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Previous Conviction.

Malabar Law.

Semble, a karnavan cannot part, by contract, so as to be unable to resume them, with the privileges and duties which attach to his position as karnavan.......... 145

Suits by a branch Karnavan of a Malabar tarwád to recover certain lands belonging to his branch tarwád which had been mortgaged by a former branch Karnavan. Plea, that the plaintiff had no right to sue without the authority of the senior member of the family, the Vélia Kaimál. Upon issue sent by the High Court, it was found by the Civil Judge that there was no binding and peculiar custom in the family depriving the senior member of all management of the property and vesting it in the branch Karnavans. Upon the final hearing it was contended that the contrary had been so irrevocably fixed by judicial decision as to prevent the matter from being open to question, and that this finding was bad in law, as being opposed to binding decrees of competent Courts.

Held, by Holloway, J.—(1.) That there was nothing compelling the Court to decide, contrary to the plain rules of law, that this delegation was irrevocable; that perhaps, it was not so even by the delegator, and still less was it so by his suc-

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cessors. (2.) That the fact of the setting apart of stánam property, if it was set apart, can make no difference, and as little can the circumstance of the income reserved. (3.) That there was nothing to prevent the Court from deciding that the Civil Judge was right in saying that this was an ordinary Malabar tarwád. (4.) That the renunciation before the Sadr Court was not even irrevocable as against him who made it, and certainly could not have the effect of depriving the senior member, for all future time, of the rights which the law of the country conferred upon him with the correlative duties upon his becoming senior.

By Scotland, C. J.—That the Court was not constrained to hold that the irrevocability of the arrangement effected in 966 by the former head of the family, as to the apportionment of the family property between two Taverais and the management of each Taverai's allotment by its senior member, was a matter conclusively adjudicated in the course of the litigation of which there was proof in the records. That such arrangement operated only as a personal renunciation and delegation of the rights of management possessed by the then head of the tarwád; and that assuming it to have been irrevocable by him, it was not binding on the 3rd defendant, admittedly the head of the family by right of seniority. 401

In Malabar the word "taverai" has several distinct meanings. In the families of the princes all the houses have separate property and the senior in age of all the houses succeeds to the Royalty with the property specially devoted to it. This mode of succession may be regarded as rather due to public than to private law. Private families have sometimes adopted the same customs, but there is the strongest presumption against the truth of this in the case of a private family. Families becoming very numerous have often split into various branches; in the language of the people 'there is community of purity and impurity between them, but no community of property.' In the only sense of the word with which Courts of Justice are concerned, people so related are not of the same tarwád. Where there are several houses bearing the same original tarwád name, but with an addition, and there is no evidence of the passing of a member of one house to another; there is the strongest ground for concluding that this separation has taken place........ 411

Malicious Prosecution.

Action for malicious prosecution. The defendant had charged the plaintiff with cheating by personation in falsely pretending that his

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(plaintiff's) wife had been delivered of a son, and procuring a child and passing him off as the son so born. The case was dismissed by the Magistrate and the plaintiff brought the present suit. The defendant alleged reasonable and probable cause and the absence of malice. The Civil Judge awarded Rupees 50,000 damages to the plaintiff. Upon appeal it was contended that the charge was not malicious, though the facts upon which it was based were allowed to be false. *Held*, that this depended upon the question of the absence of reasonable and probable cause, and in case of the absence, upon the cogency of the inference derivable from it. The test which has received the most approbation is partly abstract and partly concrete. Was it reasonable and probable cause for any discreet man? Was it so to the maker of the charge? Upon the facts of this case, *Held*, that if defendant's conduct was mere negligence, it was 'dissoluta negligentia.' That the facts alleged in support of the charge were such as, if believed at all, could only be believed and acted upon through such negligence that the inference of malice was irresistible.

In a suit for malicious prosecution, the expense of counsel is not a proper element in the calculation of damages awardable to a successful plaintiff.

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According to Muhammadan Law dower is presumed to be prompt in the absence of express contract, and may be enforced at any time ... 9

The Muhammadan doctrine of pre-emption is not law in this Presidency.............. 26

Plaintiff during his son's minority gave certain property to him and on the delivery of possession got from him a document stipulating (1.) That he would not alienate. (2.) That at his death the property should

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return to the father. This document was deposited with the father and not heard of until the property was taken in execution for the son's debts many years after the gift. *Held*, that by Muhammadan Law as well as by the general principles of law, such a restriction on alienation, especially after the gift had become complete long before, is absolutely invalid... 356

Suit by a Muhammadan female against her husband for maintenance. Defendant pleaded that he had divorced the plaintiff on the 8th January 1862. Both the Lower Courts found that no divorce had taken place upon the following facts:—Defendant went to Trichinopoly, leaving his wife at Tinnevelly. While at Trichinopoly he received letters from Tinnevelly informing him that his wife was leading an immoral life. He thereupon went before the Town Kázi of Trichinopoly, made a written declaration in the shape of a letter to plaintiff to the effect that he had divorced her, and repeated the divorce three times *successively* before the Town Kázi of Trichinopoly. Defendant directed also that the letter of divorce should be sent to the plaintiff, but there was no evidence of her having received it. *Held*, upon Special Appeal, that it was clear upon the authorities that there had been a valid divorce. The compressing the expression of the intention into one sentence seems, on the authorities, not to affect the legality of the repudiation, although some doctors consider the process immoral............ 452

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A Munsif ought not to be called on to depose as to what took place before him in the course of a trial which he was conducting as Munsif, and he is entitled to exemption.—(Rulings)........................ xlii

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The effect of Section 8 of Act XIV of 1859 is to enact that nothing in an account of mutual dealings between merchants and traders is to be barred, provided that there is one item, indicating the continuance of such dealings, proved to have occurred within the period of Limitation.................. 142

NEGLIGENCE.

Suit for damages sustained by plaintiffs by reason of injuries caused to a line of Railway, the property of plaintiffs, by the bursting of defendant's tanks. Negligence, on the part of the defendant, was not alleged in the plaint. Upon the findings—(1) That the tanks were existent before living memory. (2) That they were breached by an extraordinary flood. (3) That they were tanks constructed in the ordinary manner with escapements sufficient for all ordinary floods and such as are uni-

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versally employed. (4) That they were absolutely necessary to human existence, so far as it depends upon agriculture. (5) That the Railway was constructed with a full knowledge of their existence.—*Held*, that the suit was rightly dismissed 180

See CARRIER.

PENAL CODE, Sec. 338.

NOTICE.

Suit to recover possession of a mutah from which plaintiff had been ejected by an order of Court, passed in execution of the decree in a suit to which he was no party. Plaintiff claimed under a deed of sale from A. (a purchaser from C. and D.), dated 11th November 1860, and alleged that he purchased for valuable consideration and without notice of any other claim. Defendant asserted that plaintiff purchased fraudulently with notice of her late husband's right of purchase. It appeared that defendant's husband had sued C., D. and others to enforce a lien upon the mutah and obtained a judgment of the Privy Council upholding his lien and declaring its priority over the purchases of C. and D. This suit was pending before the Privy Council at date of plaintiff's purchase. In 1862 defendant's husband sued C. and D. for specific performance of an alleged agreement for sale, dated October 1851, without adducing any evidence as to the existence of the agreement, and got a decree in his favor because the Principal Sadr Amín had said in the original case that C. and D. had agreed to sell the mutah. The present plaintiff was turned out of possession under this decree, to the proceedings in which he had in vain sought to get made a party, on the ground that he was affected by notice of the former proceedings. He sought relief under Sec. 230, Act VIII of 1859, but his application was dismissed and he then commenced this suit. The Civil Judge decided in favor of plaintiff:—*Held*, confirming the decree of the Lower Court, that this was a case of a vendee of property, perhaps subject to a lien, turned out upon a decree against other people declaring the holder of the lien the owner of the property, and that the ejectment was wrongful and procured by a gross misuse of the Court's process.

The effect of notice of a *lis pendens* considered.

Parties seeking specific performance of a contract should come to the Court for relief within a reasonable time........................... 75

NUISANCE.

Plaintiff and defendants, occupants of neighbouring houses, were joint tenants of the party-wall. Defendants unroofed their house, raised the wall and placed beams on it to rebuild their own house. The Lower Appellate Court found, that,

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in consequence of this alteration, the rain from the defendants' house descended upon plaintiff's verandah and caused damage to plaintiff, and decreed that defendants should restore the wall to its former height, and remove the beams placed on it. *Held*, on special appeal, that taking the finding to be that the alteration created "stillicidium" where it did not exist before, or that it rendered more burdensome an existent "servitus stillicidii," it would be very dangerous to hold that every trifling excess in the exercise of a servitude should justify the pulling down of the building creating the excess: that in the present case the damages should be assessed and awarded, and the injunction to remove the roof of the house and reduce the wall be made conditional upon the defendant not removing the cause of the nuisance. In such a case the measure of damages is the amount which will induce the defendant to abate the nuisance...... 112

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A petition of regular appeal was rejected by the Civil Court, because it did not state what amount of quit-rent was payable to Government on the lands in dispute; and, therefore, did not contain the particulars required by the order of the High Court, dated 26th June 1867. *Held*, by the High Court, that the order of rejection was wrong. The utmost which the old rules justified was the non-receiving...... 422

The order of the High Court regulating the Procedure to be followed by Magistrates in the submission of records to the Appellate Court *amended* by substituting for the last part of it the words "When the order is made by a Sub-Magistrate, the copy submitted must be forwarded by the Magistrate of the Division, if any, appointed to hear appeals from such Sub-Magistrate, without more delay than is necessary for the purpose of revision to the Magistrate of the District, who will, after perusal, return the same to the Magistrate of the Division.—(Rulings)... xxxv

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ORDER OF COMMITMENT.

See CRIMINAL PROCEDURE CODE, Sec. 171.—(Rulings). xl

PATTAH.

See TENANCY.

PENAL CODE.

Sec. 174.

Accused was summoned as a witness in a case to be heard on 27th May. The summons was not served personally on accused, but

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affixed to the door of his house. On the appointed date the case was not taken up, but was adjourned by public proclamation until June 5th. On this latter date accused failed to attend. For this he was convicted of an offence under Section 174 of the Penal Code. There was no evidence that the summons had been brought to the knowledge of the accused so as to require him to attend on the first occasion. *Held*, that on the ground of there being no evidence of the commission of an offence the conviction must be quashed.

The adjournment of a trial by public proclamation is irregular and objectionable.—(Rulings)........................ xxix

A Sub-Magistrate convicted certain persons, under Sec. 174 of the Penal Code, of disobedience to summonses issued by him as Tahsildár. *Held*, that the convictions under the first part of Sec. 174, were sustainable. Madras Act III of 1869 gives a Tahsildár power to issue summonses.... xliv

Sec. 177.

Certain Vaccinators were charged with furnishing false returns to their official superior. The Magistrate found as a fact that the returns furnished were false, but acquitted the defendants on the ground that they were not "legally bound" to furnish information within the meaning of Sec. 177 of the Penal Code. *Held*, that Sec. 177 embraces every case in which a subordinate may seek to impose false information upon his superior. The defendants in the present case were public servants, and part of the duties which they undertook was to make true returns to their official superior. To make false returns was therefore an offence.—(Rulings)... xlviii

Sec. 193.

See PERJURY.

Sec. 307.

The prisoner was convicted of an offence punishable under Section 307 of the Penal Code. In addition to the sentence passed upon him under that Section, the Session Judge directed, under Section 280 of the Code of Criminal Procedure, that, at the expiration of the term of imprisonment imposed, the prisoner do execute a formal engagement in a sum of Rupees 100 for keeping the peace towards the prosecutor for a period of one year, and in default to undergo simple imprisonment for that period.

The High Court set aside so much of the sentence as directed the imprisonment of the prisoner in default of entering into the required engagement. 25

Sec. 338.

Defendant was convicted under Section 338 of the Indian Penal Code of causing grievous hurt. The evidence showed that the defendant was being driven in

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a carriage to her house through the streets of the town between the hours of 7 and 8 P. M. That the carriage was being driven at an ordinary pace and in the middle of the road; that the night was dark and the carriage without lamps, but that the horse-keeper and coachman were shouting out to warn foot-passengers; that the defendant's carriage came into contact with the complainant's father, an old deaf man, and that complainant's father was thereupon knocked down, run over and killed. *Held*, upon a reference, that the question for the Court was whether there was any evidence that the death of the deceased was induced by an act negligently and rashly directed by the accused, and that there was no such evidence. The conviction was accordingly quashed.—(Rulings)... xxxii

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PENALTY.

Third defendant, purchaser of the interest of 1st and 2nd defendants, held certain lands under the terms of a permanent kánam (A) which contained the following condition—" And (I have also agreed) that on failure to pay the said quantity of paddy the kánam amount of 550 fanams shall be received by me, and the land restored." In a suit by the kánamdár to recover possession for non-payment of rent: *Held*, that this condition of redemption was intended as a penalty to secure regular payment of the rent, and that, such being the original intention of the parties, the penalty was one which ought to be relieved against.......... 258

PERJURY.

To establish the offence of giving false evidence direct proof of the falsity of the statement on which the perjury is assigned is essential. But, as legitimate evidence for this purpose, the law makes no distinction between the testimony of a witness directly falsifying such statement and the contradictory statement of the person charged, although not made on oath. Such a statement when satisfactorily proved is quite as good evidence in proof of the charge as the criminatory statement of a person charged with any other offence, and on precisely the same ground.—That it is an admission of the accused person inconsistent with his innocence.

As to the weight to be given to contradictory statements, the sound rule is that a charge of perjury is not maintainable upon proof of one such statement not on oath, or more than one if proved by a single witness only, unless supported by confirmatory evidence tending to show the falsity of the statement in the charge.

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With respect to the kind or amount of confirmatory proof required, it must be considered in each case whether the particular evidence offered is sufficient to induce a belief in the truth of the contradictory statement or direct testimony... 342

PETITION.

Petitioner, a decree holder, attached the defendant's property in execution. Subsequently to the attachment petitioner's vakíl presented a rázináma petition to the Court on behalf of his client, praying that the attachment might be removed and execution stayed. An order was made granting the petition and allowing the decree amount to be paid by instalments. Some months afterwards the petitioner, charging that the vakíl had presented the former petition fraudulently and without authority, applied to have his decree executed. The Civil Judge refused to alter the former order, or to notice petitioner's allegations against his vakíl. On appeal, the High Court directed the Judge to investigate these allegations. The Civil Judge found that the vakíl was authorized to present the petition and that his conduct was not fraudulent. *Held*, that such a petition as that presented by the vakíl, even if within the scope of his duty, should not be permitted to alter the terms of a final decree.

The greatest caution should be exercised by the Courts before acting upon statements out of the ordinary scope of the vakil's authority in the particular matter for which he was employed............ 127

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A petition sent by post is not a substitute for the presentation of a plaint as required by Section 50 of Madras Act VIII of 1865... 136

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See JURISDICTION.

PLEDGE.

A person who pledges what is pledged to him may be guilty of Criminal breach of trust. There are two elements,—(1.) The disposal in violation of any direction of law or contract, express or implied, prescribing the mode in which the trust ought to be discharged,—(2.) Such disposal dishonestly.—(Rulings)...... xxviii

POLICE ACT.

See *Act XXIV of* 1859.

POLICE CONSTABLE.

See PROCEDURE.

POLIEM.

Zamindárs and Poligars and others in a like position, and occupying tenants, possessed different proprietary rights in land by recognition of the Government before the passing of Regulation XXV of 1802. By it the Government declared

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with the force of law their acknowledgment and confirmation of such rights, as they were then enjoyed, and in order to quiet all uncertainty and disquietude respecting them, and to establish general certainty of tenure in the holders of the same, provided for the permanent assessment of all lands liable to pay revenue to Government; and for the issuing thereupon of express hereditary grants to every Zamindár and other intermediate proprietor, and written engagements between them and their tenants:—and therefore the Regulation does not operate to exclude or disfavor the maintenance of a claim against the Government to a hereditary or other estate in lands, which had not been secured the benefits of a settled title under the Regulation, because, for political reasons, the Government has thought it inexpedient to give full effect to its enactments. But claims of title to such estates are merely left without the conclusive proof of hereditary title afforded by an Istimrárí Sannad. It was never intended that the Government, by delaying to do in regard to some estates, what the Regulation enacts should be done in regard to all lands for the purpose of setting at rest all uncertainty as to titles, should secure the power to treat all such estates as held by no permanent title whatever. The existence of a proprietary estate in poliems or other lands not permanently assessed, and the tenure by which it has been held, are, therefore, matters judicially determinable on legal evidence, just as the right to any other property... 208

POLIGA'R.

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POSSESSION.

The actual possession intended by Chapter XXII of the Code of Criminal Procedure does not include the occupancy of a mere trespasser.—(Rulings)............ xiii

PRE-EMPTION.

The Muhammadan doctrine of pre-emption is not law in the Presidency of Madras. 26

PREVIOUS CONVICTION.

The prisoner was convicted under Section 475 of the Penal Code, and having been previously convicted of an offence punishable under Chapter XVII of the Code, the Magistrate sentenced him to four years' rigorous imprisonment. *Held*, that the Magistrate had power to pass sentence of two years' imprisonment only.—(Rulings)............ ii

PRIORITY.

As Act XIX of 1843 has been repealed and the new Registration Act (VIII of 1871) contains no provision for the priority of registered deeds over any others, save in the cases of optional registration, the ordinary

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PRISONER.

A prisoner in Jail under a Civil warrant is entitled to present a petition of appeal to the Court having power to hear appeals without the intervention of a Vakíl...... 38

A deaf and dumb prisoner was convicted of an offence. Upon the trial no attempt was made to communicate with the prisoner respecting the charge against him. The High Court quashed the conviction.—(Rulings). vii

PROCEDURE.

The 1st hearing of a suit was fixed for the 10th July 1867. Neither of the parties nor their Vakíls appeared. Thereupon the Court dismissed the suit under Sec. 148 of the Civil Procedure Code, but afterwards, upon the application of the plaintiff's Vakíl, restored it to the file for hearing, under Sec. 119. Plaintiff obtained further adjournments to produce witnesses, the last being an adjournment to the 28th September. On that day the Vakíls of both parties appeared, but no witnesses, and the Court again dismissed the suit under Sec. 148, for failure to produce witnesses. On the 22nd of October the suit was again, under Sec. 119, restored to the file on the application of the plaintiff's Vakíl, and a decision was afterwards come to, for the plaintiff, upon the merits. On appeal the last mentioned decree was reversed and the decree passed under Sec. 148 (whether the first or second decree was not specified) upheld, upon the ground that as Section 119 was inapplicable to a decree passed under Section 148, the Court of First Instance had acted without jurisdiction in restoring the suit to the file. *Held*, on special appeal, reversing the decision of the Lower Appellate Court, that the first decree of dismissal, being a decree which might have been made under Section 147, was one to which Section 119 might be applied. That the second decree of dismissal was one to which Section 148 alone applied, consequently one subject only to review or to an appeal, and the proceeding had in October 1867, being substantially an application for review, was one which the Court had power to grant. 262

A Police constable was tried and convicted by the Assistant Agent of Vizagapatam under Section 44 of Act XXIV of 1859, and sentenced to fine and imprisonment. On appeal, the Agent reversed the conviction and sentence on the ground that there had been irregularity of procedure on the part of his Assistant in not recording evidence for the prosecution, and in only taking down the substance of the prisoner's statement, and not the full statement as made. *Held*, that the question was

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whether there had been such error and irregularity on the part of the Assistant Agent as to prejudice the accused and to occasion a failure of justice. That if not, the order reversing the conviction was rendered bad in law by Sections 426 and 439 of the Criminal Procedure Code. That the accused did not appear to have been prejudiced. Consequently, the order of the Appellate Court was set aside and a re-hearing directed.—(Rulings)......... xlv

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PROMISE TO PAY.

In a suit by the plaintiff to recover money lent more than three years before suit, the plaintiff alleged an express verbal promise by the debtor to pay the amount sued for made upon a settlement of accounts.

Held, by HOLLOWAY and KINDERSLEY, J. J.—That a verbal promise was not sufficient to prevent the application of the Act of Limitation.

Per KINDERSLEY, J.—If the debtor and creditor enter into a new contract, the debtor promising to pay a barred debt, that would seem to be a new cause of action, and it is doubtful whether it was the intention of the Limitation Act to insist that the new promise should be in writing................ 51

PUBLIC PROCLAMATION.

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PUNCHA'YAT.

The plaintiff sued the defendant his wife and her father (1st and 2nd defendants) to recover damages for the non-performance of a contract whereby the defendants agreed to deliver to the plaintiff a specified quantity of grain. The plaintiff and the 1st defendant appeared before a puncháyat composed of members of their caste, and, the 1st defendant having refused to live any longer with the plaintiff, the puncháyat awarded the compensation claimed, and the defendants promised to deliver the grain. It was found that the award of the puncháyat was in accordance with the custom of the caste in cases in which the wife refused to live with the husband. *Held*, that the plaintiff was enabled to maintain the suit.......................... 40

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The Code of Civil Procedure expressly preserves a distinction between arrest and

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imprisonment, and the immunity from further process is only generated by actual confinement.................. 84

RECEIVER.

Suit brought by plaintiff, as Receiver of the Tanjore Rájah's property, in April 1869, for rent for Faslis 1272-73-74-75. At the first hearing it was objected that the suit was barred, as to the claim for Faslis 1272-74, by Sec. 1, Cl. 8 of the Limitation Act. Against this it was urged that a suit had been pending for upwards of two years, and that time ought to be allowed under Sec. 14. The suit in question was brought in May 1866 by one Surfogí, who had assumed the management of the property, for the same cause of action against the present 1st defendant, and dismissed in November 1868, because the plaintiff had failed to produce any evidence. Before November 1868 the title assumed by Surfogí was set aside by the High Court, the present plaintiff was appointed and applied to the Court to make him a supplemental plaintiff, but his application was rejected. *Held*, (affirming the judgment of the Civil Judge that the claim was barred) that it was quite open to the present plaintiff at his election either to affirm or disaffirm Surfogí's contract, and that, having elected to confirm it, he should have been admitted into the former suit, but that in the present action he is in this dilemma:—Coming in as successor to Surfogí and suing upon the obligation created by his contract, the plaintiff is barred by *res judicata*. Coming in paramount to him and upon a discordant title, Surfogí's proceedings were no interruption of the period of limitation, because then Surfogí is not the person under whom he claims.

As to Fasli 1275, it was objected that pattahs and muchalkas were not exchanged as required by Act VIII of 1865, which came into force on 1st January 1866. *Held*, reversing the decision of the Civil Judge, that Act VIII of 1865 was inapplicable to the case.

The general principle is that rights already acquired shall not be affected by the retroaction of a new law. Rules as to Procedure are an exception, but the question here was not one of processual but of material law... 122

The suit was brought by the plaintiff, as Receiver of the Tanjore estate, to recover from the 1st defendant, a farmer, a sum of money alleged to be rent due to the Tanjore estate under a written agreement executed in August 1866 by the 1st defendant to the 2nd defendant who then claimed to be owner of the estate. The Judge of the Court of Small Causes considered that the subject-matter of the plaint did not constitute a cause of action to the plaintiff, and dismissed

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the plaint subject to the opinion of the High Court. *Held*, that the suit was maintainable by the Receiver to recover the fair rent payable for the use and occupation of the land under the muchalka, which was good evidence of what was the fair amount of rent. The 2nd defendant having been held to possess no title to the property could not afterwards maintain an action for the non-payment of the rent of a portion of such property, due according to the terms of the muchalka.

Held also, that the right of suit did not extend to recover anything as interest on the rent due.................. 363

RECOGNIZANCE.

Defendants were charged with theft, and on their appearance before the Sub-Magistrate on 1st May were bound over by recognizance to appear from that date until the close of the trial. On the 2nd May when the case was called on defendants were not present, but they appeared on the 3rd. The Sub-Magistrate heard what they had to say and directed the penalties on the forfeited recognizances to be levied from the defendants. *Held*, that there was no ground for the interference of the High Court as a Court of Revision; that there was nothing illegal in requiring defendants to execute such a bond, and that no notice was necessary before proceeding to enforce the penalty.—(Rulings)... xxxix

REGISTRATION.

The plaintiff brought a suit upon a specially registered bond, under Section 53 of Act XX of 1866, to recover the whole amount secured by the bond. The bond contained a stipulation that the amount should be paid by three instalments, and that in default of payment of any one instalment the whole amount should become due immediately. Default was made by the obligor.

Held, that the summary remedy provided by Section 53 of Act XX of 1866 was not available to the plaintiff to recover the whole amount secured by the bond. A summary remedy, like that provided by Section 53, must be strictly applied.................................. 4

The plaintiff sued the defendant to recover rent due upon a muchalka executed by the defendant. The defendant admitted that he occupied the land under the express contract contained in the muchalka. The muchalka was a document the registration of which was compulsory under the Registration Acts, but was not registered.

Held, that the plaintiff could not establish his case without putting the muchalka in evidence, and it was inadmissible, not having been registered........................... 45

As Act XIX of 1843 has been repealed and the new Re-

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gistration Act (VIII of 1871) contains no provision for the priority of registered deeds over any others, save in the cases of optional registration, the ordinary rule applies that the prior conveyance must prevail... 391

The registration of a deed of division of immovable property of the value of more than Rs. 100, executed by members of an undivided Hindu Family, is optional under Clause 2, Section 17 of Act XX of 1866, and a suit will not lie to compel registration.—(Rulings)...... ix

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Regulation XXX of 1802.

Neither Regulation XXX of 1802 nor Madras Act VIII of 1865 operate to make a tenancy, established by ordinary pattah and muchalka, of a permanent nature by attaching to it the condition that it should be indeterminable as long as the stipulated rent was paid.......................... 175

Regulation XXXIV of 1802.

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Regulation III of 1833.

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RELEASE.

Plaintiff sued to recover Rupees 21,650-5-1, balance of principal and interest due. He alleged in his plaint that, between the 16th February and 23rd July 1867, he paid, at the request of defendant's father, the late G. F. Fischer, Rupees 25,000 on account of the Shivaganga Zamindári; that the defendant having assumed the management of the zamindárí under an assignment from his father, gave plaintiff a receipt for the said sum of Rupees 25,000 under date the 7th August 1867; that in October and December 1867, defendant paid the sums of Rupees 5,000 and Rupees 3,000 respectively, in part liquidation of the debt, but since 20th December 1867 refused any further payment. Defendant answered that this debt due by the late G. F. Fischer had been validly released by the terms of an assignment, dated 29th July 1871; that the receipt given by defendant was a mere acknowledgment of the payment of Rupees 25,000 by the plaintiff to the late G. F. Fischer and imposed no obligation on defendant to pay the said amount; that there was no consideration for defendant's promise to pay Rupees 25,000; that when defendant executed the receipt he was not aware of the effect of the release, and that the part payments were made under a mistaken idea of liability. At the hearing it was not disputed that a release was executed, and that this claim was embo-

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died and was intended to be embodied in that written release, but it was attempted to set up a contemporaneous oral agreement, leaving this claim as a subsisting demand. The Civil Judge dismissed the suit, holding that this oral evidence could not be adduced to contradict the written release. *Held*, on Regular Appeal, that the Civil Judge was right. The principle is—Is the matter of the contemporaneous oral agreement so outside the scope of the written one that they can logically subsist together, so that the oral shall neither contradict nor modify the written?

In the present case, to set up an oral agreement that the sum released should, in fact, be paid, is to deal with an object already embodied in the written agreement in a manner antagonistic to its provisions. It is not only to vary what the words do mean, but what they were intended to mean. The subsequent receipt for the money did not create a debt, for the release had already extinguished it ... 393

RENT.

Before a dispute regarding the rate of rent can be decided in a suit brought under Section 9 of Act VIII of 1865, merely on the ground of what appears to be just, the Court must consider the reasonableness of the rate according to local usage, and, when such usage is not ascertainable, according to the rates for neighbouring lands of similar description and quality. 204

The provision in Madras Act VIII of 1865, Section 11, Rule 3,—"and when such "usage is not clearly ascer-"tainable, then according to "the rates established or "paid for neighbouring "land of similar description "and quality," does not admit of rates of rent being determined on an average of varying rates paid for neighbouring lands; but it does not require, for determination of the proper rate of rent for particular lands, the existence of a fixed general rate of rent for neighbouring lands of similar description and quality. The words "according to the rates established or paid" import clearly the power to determine the rate of rent in accordance with either the general rate at which neighbouring lands of a similar kind are let, or, where the rents of such lands vary, the rate at which rents had for any time been actually paid by some of the tenants of such lands.......................... 239

The suit was brought by the plaintiff, as Receiver of the Tanjore estate, to recover from the 1st defendant, a farmer, a sum of money alleged to be rent due to the Tanjore estate under a written agreement executed in August 1866 by the 1st defendant to the 2nd defendant who then claimed to be owner of the estate. The Judge of the Court of

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Small Causes considered that the subject-matter of the plaint did not constitute a cause of action to the plaintiff, and dismissed the plaint subject to the opinion of of the High Court. *Held*, that the suit was maintainable by the Receiver to recover the fair rent payable for the use and occupation of the land under the muchalka, which was good evidence of what was the fair amount of rent. The 2nd defendant having been held to possess no title to the property could not afterwards maintain an action for the non-payment of the rent of a portion of such property, due according to the terms of the muchalka. *Held* also, that the right of suit did not extend to recover anything as interest on the rent due. 363

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were not open to question in the High Court should not prevail. Upon the latter point *Held*, that no right of appeal existed, but that, therefore, the Civil Court had no jurisdiction to entertain the appeal to that Court, and, giving effect to the petition of Special Appeal as a petition under Section 35 of Act XXIII of 1861, that the orders of the lower Courts should be annulled and the Petitioner declared entitled to an order and certificate perfecting his title...................... 360

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The plaintiff sued the defendant his wife and her father (1st and 2nd defendants) to recover damages for the non-performance of a contract whereby the defendants agreed to deliver to the plaintiff a specified quantity of grain.

The plaintiff and the 1st defendant appeared before a punchâyat composed of members of their caste, and, the 1st defendant having refused to live any longer with the plaintiff, the punchâyat awarded the compensation claimed, and the defendants promised to deliver the grain. It was found that the award of the punchâyat was in accordance with the custom of the caste in cases in which the wife refused to live with the husband.

Held, that the plaintiff was enabled to maintain the suit..................... 40

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RIGHT OF USE OF GROWING TREES.

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RIGHT TO RECOVER.

See SALE.

SALE.

The plaintiff sued to establish his right to and to recover certain lands in the possession of which he had been obstructed by the defendants. The plaintiff purchased the lands at a sale held in execution of a decree obtained against the 1st and 2nd defendants in the Court of the District Munsif of Tripassore. The sale was directed by the District Munsif of Tripassore. Between the date of the decree and the sale the village in which the lands were situated was transferred from the jurisdiction of the District Munsif of Tripassore to the District Munsif of Conjeveram.

Held, that the sale was a nullity and conferred no

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title upon the plaintiff: but that the plaintiff was entitled to recover from the 1st and 2nd defendants the amount of the purchase money paid by him 58

The plaintiff sued to recover certain land which had been hypothecated to him in 1843, and subsequently sold to him in 1868, while under attachment in execution of a decree in a suit brought by the plaintiff to establish his hypothecatory claim. The 3rd defendant claimed under a mortgage prior in date to the hypothecation to the plaintiff, and under a sale prior in date to the sale to the plaintiff, made to the 3rd defendant whilst the land was under attachment in execution of the decree to the plaintiff.

Held, that the sale to the 3rd defendant, which was made not under any agreement with the plaintiff for the satisfaction of the decree through the Court, was invalid by reason of Section 240 of the Civil Procedure Code; but that the alienation to the plaintiff, the decree holder, during the attachment to satisfy the decree, which was duly sanctioned by the approval of the Court which issued the process of attachment, was valid.................... 65

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Suit brought to recover the amount to which plaintiff was entitled under a decree passed in favor of himself and defendant as co-plaintiffs in a former suit. It appeared that defendant purchased the property sold in execution of the decree and that the price for which the sale took place was sufficient to satisfy the decree. Instead of paying the purchase money into Court, defendant, with the knowledge and assent of plaintiff, retained the whole sum upon the understanding that he should give the Court a receipt for himself and on behalf of plaintiff, and afterwards pay to plaintiff his portion of the amount decreed. Accordingly defendant presented a petition to that effect and obtained a certificate confirming the sale. Defendant having failed to pay plaintiff his portion, the present suit was brought. Upon these facts, it was *Held*, in Special Appeal, that the decree was satisfied by sale of the judgment-debtor's property and that the execution proceedings were completely at an end, the defendant having been, by the assent of the plaintiff, made his agent for the acknowledgment of the satisfac-

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To maintain a suit for a declaration of title, some adverse act intended and calculated to be prejudicial to the title which the plaintiff seeks a declaration of, must appear to have been done by the defendant. The mere denial of the title, or doing an act which causes annoyance but cannot imperil the plaintiff's title, nor have any serious effect on the quiet enjoyment of his proprietary right, is not sufficient to support such a suit.............................. 307

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necessary to human existence, so far as it depends upon agriculture. (5.) That the Railway was constructed with a full knowledge of their existence.—*Held*, that the suit was rightly dismissed...................... 180

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(which had not been alleged), or positive law, made a part of the contract of tenancy. That neither the Rent Recovery Act nor the Regulations operated to extend a tenancy beyond the period of its duration secured by the express or implied terms of the contract creating it. That, therefore, the plaintiff had a right to eject the defendant at the end of a fasli.

By HOLLOWAY, J.—That whether the express contract was binding on the pagoda or not, it gave no right to hold permanently, and that there is nothing in any existing written law to render a tenancy once created only modifiable by a revision of rent, but not terminable at the will of the lessor exercised in accordance with his obligations... 164

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TRESPASS.

Suit to recover damages from defendant, Deputy Magistrate of the zillah of Trichinopoly, for a trespass alleged to have been committed in execution of an order made by him under Section 311 of the Criminal Procedure Code, directing the demolition of the plaintiff's house as being a nuisance to a public thoroughfare. Defendant denied his liability, alleging in justification of his order

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that he believed the house to be obstructive to public comfort and proceeded in accordance with Sections 308, 310, and 311 of the Criminal Procedure Code, and that having acted in good faith in discharge of his duties as a Magistrate, he was protected by Act XVIII of 1850. The issues settled were (1) whether the house was an obstruction and nuisance within Section 308 of the Criminal Procedure Code: (2) whether the defendant acted in good faith in the discharge of his public duty in ordering the removal of the house: (3) whether the plaintiff was entitled to the amount of damages claimed. The Civil Judge held, upon the 1st issue, that the defendant had no jurisdiction to order the removal of the house: upon the 2nd issue, that defendant had not acted with due care and attention, but from feelings of personal animosity towards plaintiff, and was, therefore, not protected by Act XVIII of 1850. Upon the 3rd issue, he assessed the damages at Rupees 500. The defendant appealed relying mainly upon the objection that no action lay against him inasmuch as, first, it had not been shown that he acted without jurisdiction in making the order complained of; and secondly, that even if he had acted without jurisdiction, he acted believing at the time in good faith that he had jurisdiction, and was, therefore, entitled to the protection given by Act XVIII of 1850. *Held*, upon the first point, that an entire absence of jurisdiction to make the order had been shown. Upon the second point, that the facts of the case furnished no reasonable or probable ground for belief in the existence of jurisdiction by a magistrate of ordinary qualifications: that the defendant must, therefore, be held not to have entertained that belief in good faith, unless the provisions of the Criminal Procedure Code, under which he acted, admit of the view that he might, not unreasonably, think that it was probably intended to apply to such an annoyance as that complained of. That, however, these provisions were open to such a misunderstanding and misapplication by a magistrate of ordinary qualifications, and consequently that the suit should be dismissed............... 423

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Suit by a Vakíl for fees. The defendants retained the plaintiff as their Pleader in Original Suit No. 2 of 1863, on the file of the Civil Court of Cuddapah, and executed a vakálatnáma to him in July 1863, but no special agreement regarding fees was made. The plaintiff conducted that suit for the defendants as their Vakíl until decree, which was made in September 1864. The present suit was instituted in December 1866. *Held*, reversing the decree of the Lower Appellate Court, that as there was no special agreement, the plaintiff's right of suit did not arise until he had completely discharged his duty in the conduct of the suit, which he had done in 1864. Consequently, the present suit having been brought within three years from that date, was not barred......... 265

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The issue of a warrant under Section 316 of the Code of Criminal Procedure is per-

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WIDOW.

The canon of the Hindu Law of Southern India, in regard to the succession of widows, is "that a wedded wife, being chaste, takes the whole estate of a man, who, being separated from his co-heirs and not subsequently reunited with them, dies leaving no male issue." The limit of the "co-heirs" must be held to include undivided collateral relations, who are descendants in the male line of one who was a coparcener with an ancestor of the last possessor.
Collateral kinsmen answering the above description have interests which pass *inter se* by right of survivorship, and a widow's right as heir is excluded by the text when any of such collateral kinsmen survive her husband. The governing principle of the rule is co-parcenery survivorship, which precludes alike the right of the widow and every other member of the family, who has no right to the enjoyment of the estate before the death of the possessor... 94
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ZAMINDA'R.

Zamindárs and Poligárs and others in a like position, and occupying tenants, possessed different proprietary rights in land by recognition of the Government before the passing of Regulation XXV of 1802. By it the Government declared with the force of law their acknowledgment and confirmation of such rights, as they were then enjoyed, and in order to quiet all uncertainty and disquietude respecting them, and to establish general certainty of tenure in the holders of the same, provided for the permanent assessment of all lands liable to pay revenue to Government; and for the issuing thereupon of express hereditary grants to every Zamindár and other intermediate proprietor, and written engagements between them and their tenants:—and therefore the Regulation does not operate to exclude or disfavor the maintenance of a claim against the Government to a hereditary or other estate in lands, which has not been secured the benefits of a settled title under the Regulation, because, for political reasons, the Government has thought it inexpedient to give full effect to its enactments.

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But claims of title to such estates are merely left without the conclusive proof of hereditary title afforded by an Istimrárí Sannad. It was never intended that the Government, by delaying to do in regard to some estates, what the Regulation enacts should be done in regard to all lands for the purpose of setting at rest all uncertainty as to titles, should secure the power to treat all such estates as held by no permanent title whatever. The existence of a proprietary estate in poliems or other lands not permanently assessed, and the tenure by which it has been held, are, therefore, matters judicially determinable on legal evidence, just as the right to any other property...... 208

Plaintiff, the Zamindární of Shivaganga, sued to recover two villages which she alleged formed part of the Shivaganga Zamindári. The villages originally belonged to Pitchama Náchiár, mother of the present defendant, Bothagurusámi Tévar, the ex-Zamindár of Shivaganga. In 1856 they were purchased by the Court of Wards on behalf of Bothagurusámi who was then a minor, with part of the rents and profits of the Zamindárí, and in 1860 were given by him to his mother. In 1864 Bothagurusámi was ousted by a decree of the Privy Council and became liable to the present plaintiff for the mesne profits of the Zamindári. In the account taken of mesne profits due, the amount expended on the purchase of these villages was excluded by plaintiff's consent from the sum debited to the ex-Zamindár. Plaintiff now sued Pitchama Náchiár, and, she dying, the suit was continued against Bothagurusámi, as her representative. *Held*, that the plaintiff was not entitled to maintain the suit. The decree of the Privy Council did not directly give the plaintiff a right to maintain the suit, for the adjudication of the Zamindárí related only to the permanently settled estate acquired under the Istimrárí Sannad of the Madras Government; and even if it could be said to include the villages in dispute, process of execution would, under Section 11, Act XXIII of 1861, be the plaintiff's only remedy. There was but one ground upon which the suit could be supposed to lie, namely, the existence of the relation of trustee and beneficiary between the Collector and the plaintiff at the time of the purchase, and such relation did not exist......... 293

The plaintiff, as the eldest surviving male representative of the Istimrár Zamindár of Shivaganga, sued for a declaratory decree establishing his right to succeed to the zamindárí upon the death of the 1st defendant; and for maintenance. Plaintiff was the eldest sur-

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viving son of the only daughter of the Istimrár Zamindár by his senior wife. The 1st defendant, the Zamindární, was the youngest of his two daughters by his 3rd wife. He had also a daughter by his 2nd wife and another by his 6th wife. 1st defendant obtained possession of the zamindárí under an order of Her Majesty in Council which established the right of the daughters of the Istimrár Zamindár to succeed to the zamindárí on the death of his surviving widow Angamuttu, without prejudice to the rights of the 1st defendant and her sisters *inter se*. When 1st defendant obtained possession, she was the only survivor of the Zamindár's 5 daughters. The plaintiff's mother and the daughter by the 6th wife predeceased Angamuttu, and the daughter by the 2nd wife and the 1st defendant's uterine sister survived Angamuttu. Beside the plaintiff's mother the 1st defendant's uterine sister was the only one of the deceased daughters who had issue, and her only child, a son, died issueless some years before 1st defendant had established her right to the zamindárí. Before Angamuttu's death the 1st defendant was twice married and had issue, by her 1st husband the 3rd defendant, and by her 2nd husband the 2nd, 4th and 5th defendants. The Civil Court made the declaratory decree prayed for, but refused maintenance. The defendants appealed upon the grounds.—That the present was not a case for a declaratory decree. But, if it were, the decree should have declared either that the 1st defendant's son (2nd defendant) had the preferable right, or that the zamindárí was stridhanam property of the 1st defendant, and that, therefore, her daughters were her rightful successors. *Held*, that the plaintiff had a right to institute the suit. That the daughters of the 1st defendant were not her rightful successors to the zamindárí, and that the plaintiff, as the eldest grandson of the Istimrár Zamindár, was entitled to be, preferably to the 2nd defendant, declared reversionary heir to the zamindárí on the death of the 1st defendant............... 310

Plaintiff, claiming title by succession both as heir by the general Hindu Law and according to family custom, sued to recover the Totapalli estate in the zillah of Rajahmundry. Defendant, the widow of the person last in the enjoyment of the estate, pleaded that the plaintiff was not of the Royal stock, but merely a dependent of the family; that he had an elder brother alive, and therefore could not sue; and that, in accordance with her husband's instructions, as contained in his Will, she was about to adopt a son. She

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also alleged that plaintiff should have become a party to an appeal pending before the Privy Council from the decree in Suit No. 3 of 1860, under which the defendant's husband had recovered possession of the estate from the widow of the prior possessor, Jaggapa Dora.

The Lower Court found that the plaintiff was an undivided member of the family in which the right to the estate was vested and a dáyadi of the defendant's late husband in the 12th degree through their common ancestor Bapam Dora; and decreed in plaintiff's favor.

Pending this appeal the Privy Council delivered judgment in the appeal from the decree in Suit No. 3 of 1860, to which plaintiff and defendant had become parties.

Held, in accordance with the judgment of the Privy Council, that the estate was acquired not by Jaggappa Dora, but by his father Bapam Dora, the common ancestor, through whom plaintiff traced his kinship, and was ever since enjoyed as ancestral property derived from the said Bapam Dora. That, accordingly, the question of succession raised in this suit, similarly to that in the appeal before the Privy Council, was determinable by the law regulating the devolution of indivisible ancestral property which had vested in the last possessor.

That the objection to the plaintiff's title as heir by the general law was thus reduced to the questions—whether his alleged kinship to the last possessor was proved, and, if so, whether according to the ordinary course of legal succession to such property, he, or the defendant as the widow of the last possessor, was heir to the estate. That upon the first question plaintiff had proved his kinship to the last possessor, and, upon the second, that plaintiff was heir to the estate in preference to the defendant, the widow of the last possessor.

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On the question of the extent to which property of the nature of an impartible Ráj is excepted from the general law by a special rule of succession entitling the eldest of the next of kin to take solely—*Held*, that such an usage does not interfere with the general rules of succession further than to vest the possession and enjoyment of the corpus of the whole estate in a single member of the family, subject to the legal incidents attached to it as the heritage of an undivided family. The unity of the family right to the heritage is not dissevered any more than by the succession of co-parceners to partible property; but the mode of its beneficial enjoyment is different. Instead of several members of the family holding the property in common, one takes it in its entirety, and the common law rights of

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the others, who would be co-parceners of partible property, are reduced to rights of survivorship to the possession of the whole, dependent upon the same contingency as the rights of survivorship of co-parceners *inter se* to the undivided share of each: and to a provision for maintenance in lieu of co-parcenery shares.

The Canon of the Hindu Law of Southern India, in regard to the succession of widows, is " that a wedded wife, being chaste, takes the whole estate of a man, who being separated from his co-heirs and not subsequently re-united with them, dies leaving no male issue." The limit of the " co-heirs" must be held to include undivided collateral relations, who are descendants in the male line of one who was a co-parcener with an ancestor of the last possessor. Collateral kinsmen answering the above description have interests which pass *inter se* by right of survivorship, and a widow's right as heir is excluded by the text when any of such collateral kinsmen survive her husband.

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The governing principle of the rule is co-parcenery survivorship, which precludes alike the right of the widow and every other member of the family, who has no right to the enjoyment of the estate before the death of the possessor.

The sound rule to lay down with respect to undivided or impartible ancestral property, is that all the members of the family who, in the way pointed out, are entitled to unity of possession and community of interest, according to the law of partition, are co-heirs, irrespectively of their degrees of agnate relationship to each other, and that, on the death of one of them leaving a widow and no near Sapindas in the male line, the family heritage both partible and impartible passes to the survivors or survivor, to the exclusion of the widow. But when her husband was the last survivor, the widow's position as heir, relatively to his other undivided kinsmen, is similar to her position with respect to his divided or self and separately acquired property ... 93